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CONTENTS

PAGE

THE DOCTRINE OF AIR-FORCE NECESSITY 1
By J. M. SPAIGHT, O.B.E., LL.D.

MATTERS OF DOMESTIC JURISDICTION 8
By Professor J. L. BRIERLY, O.B.E., M.A., B.C.L.

THE CONSENT OF STATES AND THE SOURCES OF THE LAW OF NATIONS . 20
By P. E. CORBETT, M.C., M.A.

THE TREATY-MAKING POWER OF THE DOMINIONS 31
By MALCOLM M. LEWIS, M.A., LL.B.

THE EXERCISE OF CRIMINAL JURISDICTION OVER FOREIGNERS . . 44
By W. E. BECKETT, M.A.

WANTED! AN INTERNATIONAL COURT OF PIEPOWDER 61
By Sir CECIL J. B. HURST, K.C.B., K.C.

THE OBLIGATORY JURISDICTION OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE 68
By Professor P. J. BAKER, M.A.

SHIPS OF WAR AS PRIZE 103
By Professor A. PEARCE HIGGINS, C.B.E., K.C., LL.D.

SO-CALLED STATE SERVITUDES 111
By ARNOLD D. MCNAIR, C.B.E., LL.D.

IMMUNITIES OF STATE-OWNED SHIPS EMPLOYED IN COMMERCE . . 128
By Professor J. W. GARNER.

LAWS OF MARITIME JURISDICTION IN TIME OF PEACE, WITH SPECIAL REFERENCE TO TERRITORIAL WATERS 144
By H. M. CLEMINSON.

EXPROPRIATION AND INTERNATIONAL LAW 159
By ALEXANDER P. FACHIRI.

THE HAGUE ACADEMY OF INTERNATIONAL LAW: AN AID TO THE DIFFUSION AND TO A CLEARER NOTION OF THE LAW OF NATIONS . . 172
By E. N. VAN KLEFFENS.

OBITUARY: SIR JOHN SALMOND 187

NOTES:

Submission of Treaties to Parliament before Ratification 188
Naturalization of Germans domiciled in South-West Africa 188
Two Recent Canadian Treaties. (Norman MacKenzie) 191

PAGE

DECISIONS, OPINIONS, AND AWARDS OF INTERNATIONAL TRIBUNALS, 1924–5 :

Judgments and Advisory Opinions of the Permanent Court of International Justice . 193
Arbitration between Great Britain and Costa Rica 199
Decisions of the German-American Mixed Claims Commission (*continued—see British Year Book of International Law*, 1924, p. 222). (James W. Garner) . . . 204

DECISIONS OF NATIONAL TRIBUNALS INVOLVING POINTS OF INTERNATIONAL LAW :

Supreme Court of South Africa. (Norman MacKenzie) 211
Mixed Tribunals : Egypt 219

REVIEWS OF BOOKS :

HIGGINS, A. PEARCE : *Hall's International Law.* (P. J. Noel Baker) 227
SPAIGHT, J. M. : *Air Power and War Rights* 229
BAKER, P. J. NOEL : *The Geneva Protocol* 232
FENWICK, CHARLES G. : *International Law* 234
HATSCHEK, JULIUS, and STRUPP, KARL : *Wörterbuch des Völkerrechts und der Diplomatie* 236
POOLE, DE WITT : *The Conduct of Foreign Relations under Modern Democratic Conditions* 237
STOYANOVSKY, J. : *La Théorie Générale des Mandats Internationaux.* (P. J. Noel Baker) 238
MATSUNAMI, N. : *Immunity of State Ships* 239

BIBLIOGRAPHY 241

SUMMARY OF EVENTS, MAY 1, 1924 TO FEBRUARY 28, 1925 . . . 251

INDEX 269

THE DOCTRINE OF AIR-FORCE NECESSITY

By J. M. SPAIGHT, O.B.E., LL.D.

THE doctrine of " military necessity " is well known to international law. The corresponding doctrine of " air-force necessity " will soon be an applicant for similar recognition.

The use of " air-force " as an adjective and its parallelism with " military " when so used are established by the unimpeachable authority of the Orders in Council by which, in 1918 and subsequent years, various statutes relating to the Army have been applied to the Royal Air Force. Wherever the word " military " appears in the original Acts, as, e. g., in the phrase " military purposes " in the Military Lands Act, 1892, the framers of the Orders in Council have translated that word into " air-force." There is, therefore, good precedent for speaking of " air-force necessity."

It is to that kind of military necessity which is the excuse for the destruction of private property or for general devastation that the air-force necessity here in question is analogous. The analogy is not indeed quite perfect. The destruction or devastation which military necessity authorizes is something essentially exceptional or abnormal, a departure from routine, a *fait de guerre* of a special kind and imposed by an emergency. But destruction, and possibly, in time, general devastation, may be the normal and usual means by which air forces will seek to put stress upon an enemy. The destruction of military objectives will certainly be a constituent of ordinary air operations. That part of the subject was dealt with by the writer in a former volume of the *Year Book* [1] and need not be reconsidered here. It is with the separate question of the destruction of non-military property that the present paper deals. If such destruction is carried out by air forces, it will have to be justified by an " air-force necessity " corresponding to the " military necessity " already recognized as condoning destruction of a similar kind in land war. The parallelism may not be exact, but the comparison is nevertheless useful and provides a convenient starting-point for approach to the subject. The destruction in

[1] See paper on " Air Bombardment " in the *British Year Book of International Law*, 1923–4.

question, whether carried out by air or by land (or naval) forces, is a means to an end, not an end in itself, and can only be justified as being necessary to the accomplishment of that end. The end sought may be different, as hereafter explained, and the destruction which air-force necessity will be claimed to justify may be rather part and parcel of the operations themselves and therefore hardly distinguishable from them, than a separable incident of those operations, as is destruction on the plea of military necessity; but in principle the two kinds of necessity may not unfairly be compared.

The war right of destruction and devastation is admitted by all jurists [1] and is the subject of specific provision in the service manuals. "Even total destruction of property is justifiable", states the British Manual,[2] "if it is required by the exigencies of war." "General devastation," the same manual states, "is, as a rule, absolutely prohibited, and only permitted, very exceptionally, when 'it is imperatively demanded by the necessities of war.'" [3] "Military necessity," it is laid down in the United States regulations, "allows of all destruction of property and obstruction of ways and channels of traffic, travel or communication." [4] "The measure of permissible devastation," the same manual states, "is found in the strict necessities of war. As an end in itself, as a separate measure of war, devastation is not sanctioned by the law of war. There must be some reasonably close connexion between the destruction of property and the overcoming of the enemy's army." [5]

The right is in itself unchallengeable. The only question debatable is the narrowness or wideness of the connexion upon which the American regulations properly insist between the destruction or devastation and the operational needs of the forces which carry it out. There is no doubt that doctrine, at any rate, has been tending in modern times towards a narrow interpretation of that connexion. It would allow destruction or devastation only, one may almost say, when it is a preparation for battle or an aid to self-preservation after defeat. The link between the destruction or devastation and field operations has been regarded as an essential one.

[1] See, for instance, Oppenheim, *International Law*, II, §§ 149, 154; Fauchille-Bonfils, *Droit Int.*, II, §§ 1155, 1198.

[2] *Land Warfare* (Edmunds and Oppenheim), § 408.

[3] *Ibid.*, § 434, quoting Art. 23 (g) of the Hague Rules (1907).

[4] *Rules of Land Warfare* (War Department, Washington), § 12.

[5] *Ibid.*, § 334.

In other words, the destruction of private property is held to be legitimate when it is necessary to, or at all events calculated directly to advance, the achievement of the prime object of an army or a fleet, which is the destruction of the opposing army or fleet. As an independent, self-contained, substantive means of coercing an enemy people it is banned.

The causes which have led to the imposition of this limitation are too lengthy historically to be detailed here. Prominent among them has been the consciousness of commanders themselves that their proper business was to defeat the enemy's armed forces, that every deviation from that purpose, every diversion of effort to a subordinate end, was bad policy, that all that really mattered was victory in the field, which the burning of private property would in itself not secure. Moreover, there was usually the very practical difficulty that an army was in a position to devastate an enemy's territory only when it had already defeated and pushed back the opposing army and was in occupation of that territory; and it was, normally, unwise to devastate territory of which the devastating force was in occupation, for that would have been to destroy a possible source of supplies.

But, be it carefully noted, naval and military commanders have never hesitated to destroy private property or to devastate an enemy territory *when they were in a position to do so and when it was necessary for the success of their operations*. In every bombardment private property has been destroyed, not only by inevitable accident in the shelling of defences, but deliberately and in virtue of a belligerent's war right to range his guns over the *whole* of a defended town. Instances of the destruction of private property by shell-fire in a place that was not defended are also not unknown; granaries, store-houses, fishing-nets, &c., were destroyed in the Sea of Azoff and in the Baltic in 1855, largely in towns and villages which were not of military importance nor actually defended. The classical instances of devastation, however, are to be found in land war; they are those carried out by Sheridan and Sherman in the Shenandoah Valley and the Carolinas and Georgia in 1864–5, by Kitchener in the Transvaal and Orange Free State in 1901–2, and, now, by Germany in the occupied districts of France in 1917. Whatever the menace of air power, it can hardly accomplish very much more than the older arms have achieved in these devastations, so far as material destruction is concerned.

If the " sacredness " of private property in war is thus largely a myth, the contention that warlike operations should be and are directed to purely military ends is disproved also by belligerent practice at sea. The destruction of the enemy's commerce has become the special object of modern naval operations. Provided always humanity be not outraged, operations having that end cannot be condemned by international law. " War on Commerce," says Lorimer,[1] " is no more forbidden by the law of nations than war on life ; on the contrary, if the end of war can be attained by the former, it is the latter which the law of nations forbids."

Air war will be a war on commerce, on capital, on credit. Its end will be far from being a purely military one. There is evidence abundant to overflowing in the statements of responsible statesmen and commanders that the air arm will be used for a purpose far wider than the mere destruction of *military objectives*. Its aim will be a political and psychological far more than a military one. It will seek by *direct action* to paralyse the enemy's higher administration, to interrupt his munitionment, to interfere with his life and business, to disturb and disorganize his productivity, to destroy his moral, to weaken his will and capacity as a national organism to continue the struggle.

It is an entire misconception of the position to say that governments would be mad to use their air forces for this kind of operations instead of using them against the enemy's naval or military forces. Rather, to put it bluntly, given air power, given also the modern civilized world, highly developed industrially, financially, economically, the state of their minds should really be inquired into if they did anything else. It is only common sense to recognize that modern war rests upon a foundation which is now, for the first time in history, open to attack before a nation's land and sea defences have been broken down : that foundation being, first, a vast organization of munitionment; secondly, the continuance of the economic and industrial life of the nation ; thirdly, the maintenance of the national moral.

To imagine that, because of any paper rule, this foundation will not be attacked is to dwell in a fool's paradise ; and a fool's paradise does not cease to be such because its title-deeds are to be found in an international convention. No restrictive covenant can avail to prevent that which is in the nature of things. To ask air power to refrain from the " direct action " of which it is

[1] *Institutes of the Law of Nations*, II, 84.

capable is to demand of it a self-denial to which there is no parallel in history. Every arm in turn has exploited its capacity to the full.

It is not cynicism but simply the facing of the facts to say that whether " direct action " is resorted to or not will depend on whether it is likely to be effective; and how can any one affirm that it will be ineffective until it has been tried? Does any one really suppose that, if it is likely to be effective, it will not be tried simply because of the existence of a very debatable formula which makes military objectives alone liable to be bombed and these only when they can be bombed without the " indiscriminate " bombing of the civil population? Remembering the fate of former prohibitions of a far more specific kind (e. g., that of incendiary bullets), one must be very sanguine to expect any such result. The only prohibitory rules which stand the strain of war are those which belligerents can observe without sacrificing any important military interests.

The assumption that the air arm will act merely as a subordinate of the older arms, that it will cling, as it were, to their skirt-tails and do only what they can do, is the most dangerous of assumptions. Yet it is the basis of many of the proposals made for the regulation of air warfare. It is the fundamental error of the rules proposed by the International Law Association. These rules contain the following provisions:

" 5. Aerial warfare is legitimate when directed exclusively at the following objectives, i. e., military forces, military works, military establishments; camps and depots including ammunition stores; ports or harbours used as military bases; factories engaged in the manufacture of munitions of war; lines of communication or transportation principally used for military purposes.

" 6. The aircraft of a belligerent state may lawfully be used as part of the military forces of a belligerent in the military operations of those forces, but subject to the same laws and customs of war as are applicable to the land or naval forces respectively of the belligerent and to the laws and customs of aerial warfare.

" 7. If a town, village or inhabited place is lawfully attacked or bombarded by the land forces of a belligerent with a view to its effective occupation and the attack is resisted, it is lawful for the attacking force to employ aircraft in aid of the attack or bombardment, but subject to the same laws and customs as are mentioned in Art. 6."

Anything proposed by the International Law Association is entitled to receive respectful attention, but it is submitted that such rules as these will never survive the red-hot breath of actual war. It would be wiser to admit the probability that the same kind

of necessity which is the justification for destruction of non-military property in land or naval war will most assuredly be claimed as justifying the destruction of non-military property also in air war, but, because the end of air operations is a wider one than the end of the operations of the older arms, on a far more extensive scale. To accept that probability—that certainty indeed—and then to try to regulate and control the war right which is recognized by its acceptance, that, the writer submits, is the only practical and hopeful course.

The only ground on which the doctrine of air-force necessity could be repudiated would be the humanitarian one. Destruction or devastation by bombs from the air is obviously a different thing from destruction or devastation by (at any rate) ground forces. But suppose the humanitarian objection were met: suppose it were shown that air power was willing to accept the condition that non-military property should be destroyed only when innocent lives were not incidentally sacrificed: would not the ground of the objection in that case be cut away?

The nature of the limitation must be clearly understood. It relates to the destruction of *non-military* property only. The question of the bombing of military objectives is an entirely different one. In the latter case bombing remains legitimate (provided all due care be taken) even if innocent lives are lost in the vicinity of the (military) objective. But no similar latitude can be claimed or conceded in the destruction of non-military property. There would be no admissible precedent for allowing such a concession to belligerency. Outside of actual battles and bombardments (to which the counterpart in air operations is the bombing of military objectives), the custom and practice of war have established for belligerents no right to shed non-combatant blood in the course of carrying out the destruction or devastation which the necessity of war allows.

International law should be insistent upon this matter. It should refuse to countenance any departure from the principle that air-force necessity permits the destruction of *non-military property* only when non-combatants in the vicinity *have at least the opportunity to provide for their safety*, and that attack upon such property is absolutely banned when it must involve necessarily the sacrifice of innocent life. How exactly air forces will succeed in complying with such a restrictive rule, whether it will involve their attacking the property in question only under certain favourable conditions,

in what precise manner they will ensure that the material or physical destruction does not involve loss of citizens' life, need not here be considered in detail. It is enough to say that, given the rule, air power will find the means to observe it. It will do so the more readily because, in point of fact, it will see no advantage in attacking the kind of property (citizens' dwellings, retail shops and the like) which can only be destroyed at the price of heavy human losses. Air forces will seek bigger game—the kind of property the destruction of which must have an important repercussion on the whole fabric of national life and business. But that is just the kind of property in regard to which measures of life-saving can be most readily organized.

It is only the large, simple, straightforward ideas or distinctions with which the practice of war has time or the inclination to trouble itself. It will understand and fasten upon the idea (with its consequential permissions and prohibitions) that there is nothing whatever " sacred " about private property in war but that there is about flesh and blood not in arms nor lethally engaged. That idea will be reinforced by another as simple and acceptable—that it is folly to kill soldiers, the tens of thousands of them, and greater folly still to kill civilians, who must always outnumber the soldiers, when a war can be won by striking at the nerve-centres of which armies are the extremities.

The revolution will not come in a day, but slowly, surely, inevitably, so far as one can see, war on property must replace war on life. The more effective will drive out the less effective method. Humanity will surely gain by such a change. But before it can come about international law will have to reconsider some of its cherished beliefs. In particular, it will have to enlarge its conception of military necessity to take in a new and more important kind of necessity of war, whether known as " air-force necessity " or by some other name.

MATTERS OF DOMESTIC JURISDICTION

By PROFESSOR J. L. BRIERLY, O.B.E., M.A., B.C.L.,
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ARTICLE 15 of the Covenant of the League of Nations has introduced into the terminology of international law a phrase which already shows signs of becoming a new catchword, and which is capable of proving as great a hindrance to the orderly development of the subject as the somewhat battered idols of sovereignty, state equality, and the like have been in the past. In fact journalists and politicians together have already succeeded in creating an atmosphere in which many people seem to be convinced that the maintenance of a White Australia, or the right of America to frame her own liquor legislation, is somehow bound up with the inviolability of " domestic jurisdiction " ; and we are warned against any encroachment on the province of the new fetish, about which, however, little seems to be generally known except its extreme sanctity.[1] Unfortunately, international law, doubtless because it attempts to regulate interests which engage the emotions and the prejudices of masses of men, has always been peculiarly susceptible to the tyranny of phrases ; and it may therefore be worth while to attempt, first to elucidate the meaning of this formidable newcomer, and then to estimate the significance of its arrival for the future of the subject.

It will be remembered that Article 15 of the Covenant lays down the method of procedure to be applied to those " disputes likely to lead to a rupture " which, not having been submitted to arbitration or to judicial settlement, must, in accordance with Article 12, be submitted to inquiry by the Council ; and paragraph 8, with which this article is concerned, is in the following terms :

" If the dispute between the parties is claimed by one of them, and is found by the Council to arise out of a matter which by international law is solely within

[1] The confusion surrounding the phrase extends even to the official statement of the British Government's reasons for refusing to accept the recent Geneva Protocol. Among other reasons for that course it speaks of " the weakening (by the Protocol) of those reservations in cl. 15 of the Covenant which were designed to prevent any interference by the League in matters of domestic jurisdiction." This curious inversion of the real effect of the Protocol is repeated in *The Times* leading article of the same date, March 13, 1925.

the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendations as to its settlement."

This paragraph was not contained in the original draft of the Covenant, but was added in the course of the debates in the Commission of Nineteen, in the hope, apparently, of allaying American apprehensions of foreign interference in domestic affairs.[1] Its effect is to exclude the class of disputes to which it refers, not indeed from submission to or consideration by the Council, for without these the Council obviously could not make the necessary finding as to the nature of the dispute, but from the power vested in the Council by Article 15 in the case of other disputes to make " a report containing a statement of the facts of the dispute and the recommendations which are deemed just and proper in regard thereto." Moreover it excludes these disputes only from the quasi-coercive powers of the Council when acting under Article 15, and consequently of course from the provisions for sanctions by which these powers are backed in Article 16 ; but it has no reference to any action of the League under Article 11, which declares the right of any Member state to bring to the attention of the Assembly or the Council " any circumstance whatever affecting international relations which threatens to disturb international peace," nor to any action under Article 19, under which the Assembly may " advise . . . the consideration of international conditions whose continuance might endanger the peace of the world." But under the two last-mentioned Articles the League must normally rely on conciliation and moral pressure ; they give it no powers to dictate a settlement of any dispute, and there are no provisions for sanctions if its advice is disregarded.

There would seem to be two possible interpretations of the phrase " a matter which by international law is solely within the domestic jurisdiction of a state." Clearly no matter which is regulated by a rule of international law can be a matter solely of domestic jurisdiction ; but it does not seem quite certain whether the converse of that proposition is true. In other words if a matter is not regulated by international law, must it necessarily be one of domestic jurisdiction ? Or ought we to say that there are three possibilities, so that a matter may be (*a*) regulated by international law ; (*b*) not so regulated, but yet not a matter of domestic jurisdiction ; or (*c*) a matter of domestic jurisdiction ?

[1] Cf. Temperley, *History of the Peace Conference*, Vol. II, p. 28.

The conclusion submitted in the present article is that the former view is correct, and that the suggested class (*b*) does not exist.[1]

The language of paragraph 8 itself seems to confirm this interpretation. A state may properly be said to have jurisdiction over a matter by international law whenever that law recognizes it as having authority to decide any particular matter; and it has "sole" jurisdiction in the same way whenever it has that authority alone and to the exclusion of any right in any other state to a voice in the decision. But surely the theory of international law is that a state may act as it will and may decide any matter whatever precisely as it likes, unless some rule of law exists which is applicable in the circumstances, and that it may do so without consideration for the wishes or the interests of any other state. One may desire to see that principle modified, but that it is a fundamental principle of existing international law can hardly be in doubt. The word "domestic" can hardly in this context have any restrictive effect on the meaning of "jurisdiction," it is difficult to see for instance how it can here be used in contrast with "foreign," which would doubtless be its natural correlative. Certainly this is practically to treat the word "domestic" as otiose; but the French text, which speaks merely of "une question que le droit international laisse à la compétence exclusive de cette partie," seems to show that it is so, and makes it impossible to say that "domestic jurisdiction" means jurisdiction over domestic or internal, as contrasted with external matters, though possibly this was the intention of the draftsman. To abbreviate the phrase "matters within domestic jurisdiction" into "domestic matters" is convenient but misleading.[2] Thus the view suggested is that international law can adopt only one of two alternative attitudes towards any action by a state out of which an international

[1] This view is also taken by Professor E. M. Borchard in a note in the *American Journal of International Law*, for January, 1925. He defines "domestic questions" as "the sum total of national interests minus the interests governed by International Law"; and draws an instructive analogy between such questions and the reserved powers of the States under the American Constitution, under which all powers not granted to the United States are within the domestic jurisdiction of the several States.

[2] Cf. on this point and generally on the subject of domestic jurisdiction, F. Castberg, "La Compétence de la Société des Nations," in *Revue de dr. int. et de lég. comp.*, 1922. He writes, "Il n'est pas à supposer que le mot *domestic jurisdiction* a été employé pour faire ressortir que les droits inhérents à la souveraineté *extérieure* des États doivent être moins efficacement sauvegardés contre les interventions du Conseil que ceux qui relèvent de sa souveraineté intérieure. En tout cas, le texte anglais n'est pas si décisivement en conflit avec le texte français que celui-ci, qui est bien clair, ne doive pas être appliqué suivant ses termes." This view is not accepted by J. Paulus, "Les Affaires domestiques," in *Revue de dr. int., de sciences diplomatiques, etc.*, 1924.

dispute has arisen ; it may say that the action in question falls under some rule of law by which its legitimacy ought to be tested ; or it may say that no rule of law is applicable, and this, it is submitted, is equivalent to saying that the matter is one which it leaves solely within the domestic jurisdiction of the state concerned.

The meaning of paragraph 8, however, has been considered by the Permanent Court of International Justice in the case of the Tunis and Morocco Nationality Decrees,[1] and though the language of the Advisory Opinion is carefully guarded and mainly directed to the question at issue, whether the matter out of which the particular dispute between Great Britain and France arose was one solely of domestic jurisdiction or not, it seems to support the interpretation here suggested. It is true that the Court are careful to point out that paragraph 8, containing as it does an exception to the principles of the preceding paragraphs of Article 15, does not lend itself to an extensive interpretation ; but it seems certain that throughout their remarks the Court contemplated only two kinds of matters, those regulated by international law and those which are not, and that they identified the latter with matters " solely within the domestic jurisdiction," or " solely within the jurisdiction," two phrases which appear to be used indifferently. For example the Court used a metaphor of two " domains," one governed by international law and one reserved for domestic jurisdiction, pointing out that the boundary between the two is a shifting one, since a matter may pass from the latter into the former owing to a development of international relations, or because a state may have entered into some international engagement on a matter which otherwise would be within its reserved domain ; there is no hint whatever of any third " domain," or of any distinction between matters not regulated by international law and matters reserved for domestic jurisdiction. The two phrases seem to be treated as interchangeable.

A difficulty, however, in the way of the interpretation of the phrase here contended for is that its acceptance makes it very difficult to attach an intelligible meaning to the provisions of the scheme of compulsory arbitration contained in the recent Geneva Protocol for the Pacific Settlement of International Disputes, and although the question of the acceptance of the Protocol is now a dead issue, it is right that we should pause before adopting an

[1] Publications of the Permanent Court, Series B, No. 4. The relevant passages of the Court's Advisory Opinion are printed in the *Year Book* for 1923–4 at pp. 175–8.

interpretation which would reduce those provisions to something very like nonsense. The provisions which give rise to the difficulty can be shortly stated. Under the scheme of the Protocol the signatory states were to recognize as compulsory the jurisdiction of the International Court in the cases mentioned in Article 36 of the Court's Statute, one of which is " any question of International Law " (Article 3 of the Protocol). Disputes which turn on questions of International Law having been thus provided for (except in the case of a state having reserved certain of such questions, as it was to be entitled to do, from its acceptance of the Court's compulsory jurisdiction) there followed a very elaborate scheme for the settlement of disputes, of which the general effect, so far as is here relevant, was to ensure that in the last resort a dispute should be settled either by a unanimous report of the Council, or by the award of a Committee of Arbitrators which might if necessary be imposed on the parties. Now it is perfectly clear that these provisions were quite unnecessary for the settlement of disputes turning on questions of law ; so that it would seem almost certain that the draftsmen must have had in contemplation some kind of disputes other than those which were to be settled by the Court. Yet we find in Article 5 that paragraph 8 of Article 15 of the Covenant was to continue to apply in proceedings before the Council, and that if a claim of domestic jurisdiction should be raised in the course of an arbitration, the arbitrators were to take the advice of the Court, and in the event of the Court upholding the claim, to confine themselves to so declaring in their award. It seems to follow then that if " domestic jurisdiction " has the meaning suggested above, the total effect of the provisions elaborated with almost meticulous care in the Protocol would be (1) that with the possible exception of legal questions reserved by a state in accepting the compulsory jurisdiction of the Court the only disputes with which the Council or the Arbitrators could have to deal would be such as arise out of matters not regulated by international law, and (2) that these were the very class of disputes with which they were to be precluded from dealing. It need hardly be said that the framers of the Protocol could not have intended to produce this Gilbertian situation ; and it is clear that either they did not regard matters of domestic jurisdiction as co-extensive with matters not regulated by international law, which would mean that they had in mind some third " domain," a sort of legal limbo containing a third class of disputes

which they did not specify, or else that they somewhat carelessly incorporated into their work the provisions relating to domestic jurisdiction, which were already contained in the Covenant, without seeing that in their changed context these provisions were fatal to their scheme. That the latter is the true explanation seems probable from M. Politis's General Report to the Assembly on the work of the First Committee, in which he clearly implies that there are only two possible classes of disputes; for after stating that the Arbitrators must refer to the Court a claim of domestic jurisdiction raised in the course of an arbitration, he continues :

" The Court will thus have to give a decision as to whether the question in dispute is governed by International Law or whether it falls within the domestic jurisdiction of the state concerned. Its functions will be limited to this point. . . . It is only if the Court holds that the question in dispute is governed by International Law that the arbitrators will again take the case under consideration in order to give a decision upon its substance."

Surely this is equivalent to saying that the arbitrators may decide only those matters in which under the scheme no decision of theirs can be needed, because they will normally have been decided by the Court without ever reaching the arbitrators. Astonishing, therefore, as is the effect on the Protocol of identifying matters of domestic jurisdiction with all matters not regulated by international law, it would seem that it affords no sufficient reason for abandoning this interpretation of the phrase.

But important as it is that there should be a clear understanding of the meaning of the phrase " matters of domestic jurisdiction," it is even more important to realize an extremely inconvenient truth about them, which seems to have been insufficiently appreciated by the framers of the Protocol, and almost completely neglected in the flood of discussion to which it gave rise. That truth is simply that on any interpretation of the phrase, the great majority of really dangerous international disputes arise out of matters which indisputably fall within the category of domestic jurisdiction, and the problem of how to deal with them is the most crucial, and unfortunately also the most intractable, of all international problems. On no interpretation can domestic jurisdiction be limited to such generally non-controversial matters as a state's choice of constitution, its right to regulate immigration, tariffs, naturalization, and the like, though no doubt these are the matters to which paragraph 8 was primarily intended by its authors to apply. These are domestic questions which probably

not even the most ardent internationalist, unless he were entirely devoid of a sense of the practicable, would propose to remove from the sole jurisdiction of the state whose interests they primarily, but by no means solely, concern. But questions such as these shade off into others of a more contentious kind, such as the treatment of racial or linguistic or religious minorities, misgovernment producing repercussions in other states, selfish exploitation of undeveloped countries, unfair preferences in matters of traffic or customs, and innumerable others. It is not particularly urgent to improve our international machinery for the settlement of legal disputes, because these are rarely dangerous, and moreover the machinery that we already have is working very satisfactorily ; but it is vitally urgent that we should face the problem raised by disputes arising from matters of domestic jurisdiction, provided that we face it wisely ; for it would be better to do nothing at all than to let our impatience for a solution outrun the limits of what is practicable in the present state of international feeling, and thus almost certainly to offer to the world a solution which will prove later to have solved nothing. For these reasons and with the object of considering whether recent attempts at the solution of this intolerably complicated problem have been based on a sound appreciation of its true nature, it seems worth while to examine what has been done or attempted in the years since the war.

On the whole there would seem to be two fairly clearly contrasted methods of attacking this problem, both of which have been tried in recent years. One is the method of conciliation, of persuasion, of reasonableness ; it rests on the belief that the most hopeful means of settling a dispute which the parties have failed to settle for themselves is to provide the machinery, and ensure that there shall be the time, for collecting a number of sensible men, more or less detached from the dispute, " round a table " ; only get them to talk the matter over with one another and with the parties and they will probably find a more or less satisfactory way out of the difficulty. In the nature of the case this method can never be scientifically certain of success, and logically perhaps there is little to be said for it ; but then those who favour it do not believe that human conduct is generally very logical, or that its study can ever be made into an exact science. This is the method which instinctively commends itself to most Englishmen ; it is also the method which on the whole was adopted in the Covenant. The other method is formal and legalistic ; it believes in a plan carefully

elaborated beforehand in every detail, in the hope that every possible case that may arise will prove to have been provided for; it proceeds as though human conduct could be imprisoned within a logical mould, and in lawyers it is generally accompanied by a belief in codification as a sort of panacea for all legal ills. This is the method which on the whole has been predominant in Continental legal thought for about a century, and it has reached its apogee in the Protocol. The Protocol itself is dead, but the spirit which inspired its method is not.

The contrast here suggested between the methods of the Covenant and of the Protocol, which has generally been represented as a mere development of principles contained in the Covenant, calls for justification. Superficially regarded, all that the Covenant did towards solving the problem of domestic jurisdiction was to exclude it from the coercive powers of the Council under Article 15, which in itself was hardly a helpful provision. Yet it is submitted that even from this special point of view the Covenant was an achievement of quite inestimable value. It is true that formally it seemed to do nothing or worse than nothing in the matter, but then the Covenant is an extremely informal document, and so too are the methods on which it chiefly relied for the settlement of disputes. Incomparably its greatest service was to create an organization, which, as its authors rightly foresaw, would render conciliation easier and prompter, because it would be capable of bringing moral pressure to bear on a refractory state by focusing upon it the newly discovered but immensely powerful force of international public opinion.[1] The merits of a scheme of this kind, leaving almost every detail to the good sense of the men who would have to work it, were but slightly impaired by the insertion of paragraph 8 into Article 15, for that paragraph only had the effect of excluding matters of domestic jurisdiction from what to the present writer at least seem the less typical and less valuable provisions of the Covenant, that is to say, from the provisions for the authoritative settlement of disputes by the Council and from the sanctions; it did not exclude them from the vaguely formulated but tremendously powerful influences which can be mobilized to work for a peaceful solution under Articles 11 and 19. But to exclude such matters from the Protocol was a totally

[1] Cf. Temperley, *History of the Peace Conference*, Vol. II, p. 23, where it is pointed out how small a part ideas of international law and arbitration played in the provisions of the Covenant.

different question; for the Protocol aims essentially at a mechanical completeness; it professes, in the words of the Report already quoted, "to fill in the gaps in the Covenant and to define the sanctions in such a way that no possible means could be found of evading them," and yet here at once is a yawning "gap" of tremendous dimensions which is simply passed over as if it did not exist. "Our purpose," says the Report again, "was to make war impossible, to kill it, to annihilate it. To do this we had to create a system for the pacific settlement of *all disputes* [1] which might ever arise. In other words, it meant the creation of a system of arbitration from which no international dispute, whether juridical or political, could escape. The plan drawn up leaves no loophole; it prohibits wars of every description and lays down that all disputes shall be settled by pacific means." But it was a true saying of President Lincoln [2] that "nothing is settled until it is settled right"; and a dispute is certainly not "settled" when it has been labelled "domestic jurisdiction" and the aggrieved party has been told that nothing can be done about it; it is merely left to fester, and it becomes a matter of luck whether it will not poison the whole international body politic. Thus the essential difference between the Covenant and the Protocol is that while the Covenant never professed to "settle" these disputes, it did in fact make their settlement easier; whereas the Protocol, professing to "settle" all disputes, excluded from its scheme the most dangerous class of all. But this is not the whole of the contrast between the two methods; for not only were the arbitration provisions of the Protocol in this respect a mere sham, the more dangerous because they professed to leave no "gaps," but they would, in conjunction with the provisions for security, have made a definite retrogression from the promising position already secured under the Covenant, for they would to all intents and purposes have stultified the conciliatory machinery of the Covenant. It requires no very vivid imagination to foresee the probable attitude of a state pressed by its fellow Members of the League to make some concession in a matter found to be one for its domestic jurisdiction, for it will naturally ask itself what are likely to be the consequences of standing firm. Under the régime of the Covenant those consequences are not specified, but at least in a proper case they are likely to be unpleasant; under the Protocol they could be

[1] The italics are in the Report.

[2] Quoted from Holls, *Peace Conference at The Hague*, p. 283.

nothing at all, unless indeed the other party to the dispute should be provoked into a resort to war, in which event the refractory state would have the comforting assurance that the very states which had been urging it to make reasonable concessions would be pledged to its defence.[1] If a scheme leading to such a result could ever work, which happily is improbable, the prospect of settling this class of disputes by conciliation would be small indeed.

It is, of course, perfectly true that in the existing state of international feeling it would be impossible to include in a scheme of compulsory arbitration provisions for a real settlement of all matters of domestic jurisdiction. But that means only that the world is not ready to accept a scheme of *universal* compulsory arbitration, which is what the Protocol professed to be. The Covenant wisely left " gaps " in its scheme, because unfortunately there are still " gaps " in the links that unite the nations to one another, and these are not in the least likely to be closed at one dramatic step forward. The wiser course is to return to the methods of the Covenant, and to develop them patiently, step by step. If we can learn this lesson from the unhappy fate of the Protocol, its short embarrassed life will not have been in vain.

The Covenant indeed contained no panacea for this problem of matters of domestic jurisdiction for the good reason that there is none, but there are ways in which its gradual solution can be advanced. It is perhaps just possible that Article 11 or Article 19 of the Covenant might be amended, so as to confer some degree of authority on the advice or suggestions for a settlement offered by the Council or the Assembly ; for example, it is conceivable that the recommendation of a certain majority might be made authoritative. But this would at once cause an outcry that the League was being converted into a super-state, and moreover it would raise the awkward question whether the votes of the different states ought not to be valued in some sort of proportion to their obviously unequal importance, instead of being merely counted. It is probably wiser to trust to the increasing moral influence of the League to strengthen these Articles rather than to any formula ; especially as the effectiveness of whatever formula might be adopted would entirely depend on that factor. But an essential condition of any progress is a more general recognition that under the phrase

[1] It is true that in the case supposed, by no means an improbable one, the state resorting to war would not under Article 10 be *presumed* an aggressor, but it would be the clear duty of the Council to *declare* it one.

" domestic jurisdiction " are comprised a multitude of matters differing widely from one another, and that it is unreasonable to expect that disputes arising from all of them can be settled in the same way. The Protocol would have " settled " all of them indifferently by guaranteeing every state against having to make any concession against its will, which is as unreasonable as the proposal of idealists at the opposite extreme to do away with state independence altogether. Australian immigration is a matter of domestic jurisdiction, but so too were the Armenian massacres ; and it is preposterous to speak as though these two matters must necessarily both be dealt with on the same principle merely because they have this common quality. Of course we do not really believe that they should, nor do states act as if they should, but that is only because their practice is often better than their professions or than the theory of the law ; for in fact to speak, for instance, of the importance of preventing " any interference by the League in matters of domestic jurisdiction," [1] is simply to bring under a single rubric matters which differ *toto coelo* among themselves. The meaning would be exactly the same, and only the absurdity would be more apparent, if we could be persuaded to proscribe the term " domestic jurisdiction," and speak of the importance of not allowing any interference in matters for which international law has no rule, but such a cause would probably enlist only a tepid enthusiasm. There is a perfectly good reason why Australia should be at liberty to decide her own immigration policy, but the reason is simply that most of us think that on the whole immigration is a matter that each state should regulate for itself and that common international regulation is better excluded ; whereas most of us do not think it desirable that a state should decide for itself whether or not it will carry out a massacre on a colossal scale even though the victims may be its own nationals. In other words domestic control of immigration, naturalization, and the like, will be in no sort of danger if it will cease to shelter itself under a mischievous phrase, whether it be sovereignty, or independence, or domestic jurisdiction, or whatever the next catchword may be, and claim the right to exist on its own merits ; and it would then be possible to begin an unprejudiced consideration of how to deal with that other class of questions, at present using the same shelter, of which Armenian massacres are only an extreme

[1] Cf. the speech of the British Foreign Secretary explaining the attitude of the British Government towards the Protocol : *The Times*, March 13, 1925.

illustration, which not merely idealist, but average, international public opinion does not really propose to leave to the sole determination of any single state. In practice this other class of matters is regulated fitfully and precariously, sometimes by common international action, and sometimes by pressure, either forcible or backed by the implied threat of force, from interested states; but every state would be a gainer if gradually and with proper consideration of each step these interferences with domestic jurisdiction, which will certainly continue, were regularized, and the matters themselves converted into matters of international law. This process has in fact begun under the machinery of the Covenant; it offers no sensational success, but it is one of the most promising features of the international outlook to-day, and it calls not only for our willing co-operation, but above all for the exercise of a wise patience.[1]

[1] The article on the Codification of International Law in the *Year Book* for 1924 by Professor P. J. Baker contains an interesting appreciation of this side of the League's activities.

THE CONSENT OF STATES AND THE SOURCES OF THE LAW OF NATIONS

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In the treatises of the last hundred years there has been an enormous amount of writing on the sources of international law. The more voluminous theorists devote chapters to the subject, and even the compilers of the briefer manuals attempt to supply a list. To the severely practical reader much of this doubtless appears sheer, riotous logomachy, and he hastens on through introduction or chapter one to the pages where he may hope to find some statement of what the law actually is.

The student with an appetite for analysis reads and is perplexed. For divergences of opinion corresponding to differences of school, he is prepared. He does not expect the naturalist and positivist to trace their principles to the same origin or to cite the same authorities. But when writers professing the same general views with regard to the nature of international law display a more or less total absence of agreement on the connotation of " cause," " origin," " source " and " evidence " in the application of these words to their science, he experiences a certain surprise. That surprise is the more justified in that, as he presently discovers, the confusion extends to such fundamental matters as, for example, the relation of custom and treaties to law.

We need examine only a very small number of the general works on the law of nations to realize that " source " is used by different writers, sometimes even by the same writer at different times, to express the concepts of cause, origin, basis and evidence. This fluctuation in terms, with its regrettable consequences, has been noted repeatedly. Yet, taking two publicists so widely apart as Pradier-Fodéré, the first volume of whose monumental treatise appeared in 1885, and de Louter in his Carnegie edition of 1920, we find that there has been little advance towards fixity or clearness.

Pradier-Fodéré says :

" Les auteurs ne s'accordent ni sur la classification, ni sur l'importance respective des sources du droit international, et même ils ne paraissent pas avoir une idée nette de la signification du mot source. Ils confondent généralement les sources avec le fondement du droit international, et quelquefois ils considèrent comme une source de ce droit ce qui n'est que l'instrument intellectuel au moyen duquel on en trouve les règles." [1]

De Louter follows in 1920 with this :

" L'étude des sources du droit international occupe une place considérable. A juste titre, car nulle part la confusion n'est plus grande, et, dès lors, la clarté plus nécessaire qu'ici. Cette étude est en étroit rapport avec la conception de la nature du droit international en général, car cette conception se reflète fidèlement dans le choix des sources dont on croit pouvoir la déduire." [2]

Now though we cannot agree with de Louter that the conception of the nature of international law is faithfully reflected in the choice of sources, since, as already pointed out, writers more or less in harmony on the first point may differ widely as to the second, yet it is clear that the concepts for which this hard-worked word is made to serve are of different character and very different degrees of importance, and, further, that their real bearing upon the law is frequently lost sight of by faulty classification.

Agreement upon fixed and uniform terms in the statement of the general principles with which the science of international law begins is eminently desirable as being a condition of didactic clearness. At the present time such agreement may with some justice be considered a matter of considerable importance for another reason. The movement towards general codification is gathering force, and is it not quite conceivable that the widespread confusion in relation to the various ideas connoted by the word " source " may manifest itself in an equal uncertainty as to what are the substantive rules to be codified ?

The writer, while fully aware that there are still disciples of the naturalist school in the field, assumes that the general view of international law which has, for all practical purposes, definitely prevailed is that of the positivists. Any codification which may be undertaken will, then, proceed along positivist lines. Setting out from the postulate that only that is a rule of international law which has received the general assent of states, it is the object of the present article to suggest a fixed use of the terms " cause," " basis," " origins " and " records " or " evidence " of the law

[1] Vol. I, 324.

[2] *Droit International Public Positif*, Vol. I, 35.

of nations, which will clearly differentiate four distinct concepts and assign their proper place to some of the fundamental elements of the science.

In his *Chapters on International Law*, Westlake expresses the view that the ultimate source in the sense of "the cause why any rules of international law exist," is "the social nature of man and his material and moral surroundings." [1] If for "man" we substitute "states," we obtain an accurate statement of the reason why a system of binding rules is necessary and actually exists. States are as essentially social as the individual members of each. It is as possible to conceive of a condition of complete isolation for one as for the other. They are the units of a larger community, and given the idea of a community the idea of law follows as an immediate corollary. The reason for a law between states is of precisely the same nature as the reason for a law between the citizens of a state. Given this *reason*, we should perhaps be more exact in saying that the *cause* of international law is the desire of states to have their necessary mutual relations regulated with the greatest possible rationality and uniformity.[2]

This desire, being the active agent which produces international law, is accurately and adequately described as its cause. There is no necessity of introducing here a word like "source," which, becoming *source* in French and *Quelle* in German, has, even more than in English, figurative associations productive of confusion.

With this reason and cause the international lawyer is little concerned except as justifying the extension of the idea of law from the municipal to the international sphere, and perhaps as a touchstone for new law, though this latter is of course the business rather of the legislator.[3] The term "ultimate or primordial source" is sometimes applied to something of infinitely greater practical moment. According to Holtzendorff, for example, the primordial source of international law is the consent of states.[4] Now if "primordial" meant "immediate," this would at least be com-

[1] p. 80.

[2] This, or some other alleged cause, is sometimes regarded as the "origin" of international law. We shall deal later with the origins of the rules of international law. The origin of the system, in the sense in which the writer would use that phrase, is to be looked for in the events and writings of the sixteenth and seventeenth centuries.

[3] Cf. Westlake in the passage cited above—"a test with which any particular rules of that law must comply on pain of not being durable rules."

[4] *Handbuch des Völkerrechts*, Introduction, 24.

prehensible. The writers who assert that the immediate source of international law is the consent of states are in substance right. This consent plays the part in the law of nations of what Salmond calls, in reference to municipal law, "formal source." [1] It is the *sine qua non* of every rule in the system and as such demands a distinct title which will remove all possibility of confusion with less vital matters.

Several writers have observed that to describe consent as the source of international law is to confound source and basis, or as the French jurists put it, "fondement." [2] The criticism is not entirely justified; for, since every rule of international law derives its legal authority solely from the consent of states, this may, as a mere question of language, be accurately called at least its formal, as opposed to material, source. The structural metaphor does, however, tend to invest the fact with its essential importance. The sources of a stream may be many, but there is only one foundation or basis of a building. The rule itself, like the whole system of which it forms a part, is built upon the consent of states—its material content may be of manifold origin.

It is exclusively to the origin of the material content of a rule, sometimes styled "historical source," that the writer would apply the term "source," *if it is to be used at all.* The sources of international law would thus be the origins of the rules which go to make up the system, and any entanglement with the "cause" or "basis" of the system as a whole would be avoided.

International law, more than any other system, must be studied historically. We wish to know first, if possible, how a given rule came to be suggested—whether by practice in antiquity, by the reasoning of some jurist, by the terms of a treaty, or by the action of some state in a particular situation—then the successive steps of its generalization. It is only, indeed, by such investigation that we can ascertain whether an alleged rule is so in reality and at what time the conduct it prescribes became compulsory. The fact that it is still possible to dispute so much of what is advanced as substantive international law is largely due to *lacunae* in the data for this process,[3] and though the virtues

[1] *Jurisprudence*, Chap. vi.

[2] See, among others, Pradier-Fodéré, *loc. cit.*; Fauchille, *Manuel de Droit International Public*, 8th ed., Vol. I, p. 41. "Basis" is used by Oppenheim, *International Law*, Vol. I, § 11 *et seq.*, and by Hyde, *International Law chiefly as interpreted by the United States*, Vol. I, p. 4.

[3] Cf. Mr. Justice Gray's opening remarks in his history of the rule exempting fishing-boats from capture.—The *Paquete Habana*, 1899, 175 U. S. 677.

of codification are by no means unalloyed, the continuing effort in that direction will at least have the advantage of leaving clearer records of acceptance or rejection.

The origin of a rule may at the same time constitute evidence of the consent of one or more states to it. This is the case, for example, with those rules as to the conduct of hostilities which developed from the instructions laid down for the guidance of the military forces of particular states, and with those conventions, so frequently incorporated in consular treaties, regarding the exercise of jurisdiction over merchant vessels in foreign ports, which are now in process of hardening into law. The same may be true of customary rules traceable to the course of action taken by a particular state in a recurring set of circumstances.

Frequently, however, the origin is to be found in some entirely unofficial source, as for example in the practice of states now extinct or in the principles advocated by a publicist. A familiar instance of the former type of rule is the inviolability of ambassadors, which originated in the usages of the Greeks, Romans and Hebrews; of the latter, the extent of territorial waters, for which Bynkershoek laid down the first effective criterion. In such cases the task of proving the subsequent incorporation of the principle in the positive law of nations takes us to records of unlimited variety, none of which can be regarded as the origin of the rule. We may find proof of acceptance in authentic general history, in the minutes of negotiations, in treaties, in state papers, in laws, or in ordinances. All such documents serve only as evidence of consent; it is to them that the term " source " is applied, as it frequently is,[1] with the least justification. The answer to the question,—What is the source of your rule?—must be entirely different from the answer to the question,—What is your evidence of, or authority for, the rule?

The method of proof and the distinction between source and evidence is well illustrated in the judgment delivered by Mr. Justice Gray of the United States Supreme Court in the case of the *Paquete Habana* and the *Lola*, 1899, 175 U. S. 677. There the source of the exemption of fishing-boats from capture was found in an ancient usage; its actual existence as an obligatory rule was proved by reference to early European treaties, edicts and ordinances, the compilation *Us et Coutumes de la Mer*, treaties and practice of the United States, British Orders in Council of 1806 and

[1] See, for example, Pradier-Fodéré, Vol. I, 26.

1810, and a Japanese ordinance issued in 1894 on the outbreak of war with China.[1] Words become meaningless if each of these references, or the whole of them as a group, is to be described as " a source " or " the source " of the law that coastal fishing-vessels shall not be subject to capture. Writers who use the term in this way are confusing the sources of international law with the sources of information about it.

More than one writer since Holtzendorff, asserting that " source " in the science of law has a meaning corresponding to that of " spring " in ordinary parlance, has proceeded to the conclusion that the source of a rule being the form in which it first shows itself as such, as the spring is the form in which a stream emerges from the ground, the sole sources of international law are custom and treaties.[2] Others have arrived at the same conclusion from the premiss that custom and treaties are the modes of formation of all the rules governing states in their mutual relations,[3] which is probably the same conception stripped of its figurative expression.

Now there is only one mode of formation of rules of international law, and that is the acquisition of consent. Custom proves the achievement of general consent. Treaties, considered as agreements, are acts of consent; considered as documents, they are records or evidence of consent.

Some of those very writers who regard custom as one of the two sources go on to treat it either as a sign,[4] or as a part[5] of international law. In the one case they confuse source and evidence; in the other, practice with the rule by which it is dictated.

The only customs which can be accurately described as sources, in the sense of origins, of international law are those which pertained before the establishment of the modern family of nations, and which were drawn upon in the establishment of

[1] Cf. *Reg.* v. *Keyn*, L. R. 2 Ex. D. 63, at p. 154, and *West Rand Central Gold Mining Co.* v. *Rex*, L. R. 1905, 2 K. B. at p. 407.

[2] Holtzendorff, *op. cit.*, I, 321; Oppenheim, *op. cit.*, I, 15; de Louter, *op. cit.*, I, p. 42; Hyde, *op. cit.*, I, p. 6.

[3] Nys, *Droit International*, Vol. I, p. 148; Fauchille, *op. cit.*, Vol. I, p. 41.

[4] De Louter says, Vol. I, p. 48: "La coutume est le signe du droit positif, non sa cause ou son origine; comme l'a dit très exactement le maître de l'école historique."

[5] Fauchille, 54. Westlake, *International Law*, Vol. I, p. 14, " . . . custom as a part of law means conduct, &c." Hyde, *op. cit.*, Vol. I, p. 6 . . . combines the two notions in this curious way—" In such a sense international custom is indicative of a general practice which may be fairly accepted as law."

some parts of the existing law. The practice of certain ancient states in the matter of ambassadors has already been cited as an example. In regard to institutions of more recent origin it is useful to distinguish between usage and custom, usage being the recurrent practice of particular states and custom practice followed by the civilized states in general. A particular usage may be the source of a customary rule of international law—the recurrent practice of a few countries may be taken up by others until it becomes general, and it may be impossible to go behind the usage to any remoter origin—but custom is the generalized practice which proves the existence of the rule.

The meaning of "custom" may, of course, be stretched to cover "not merely a habit of action, but a rule of conduct resting on general approval." [1] That is, indeed, the significance of the word when the English lawyer is called upon to "prove a custom." There are two objections to extending this to the science of international law while at the same time making custom the chief source, or one of the chief sources, of that law. In the first place, it confuses the source with the law itself, and, secondly, it assigns a legislative rather than an evidentiary rôle to custom. Custom is important to the international lawyer only as demonstrating the general assent of states; it is that assent which makes the law. When usage has become universal, it is custom, and the principle of which it is the application is law.

This does not involve an unreserved acceptance of Savigny's [2] view that the rule precedes the custom, the latter being merely the external manifestation of a principle already present in what between states corresponds to the *Volksgeist* in a people. Usage, indeed, precedes custom, but the generalization of usage into custom and the establishment of the customary rule are simultaneous. Until the course of action is widely enough adopted to be taken as having enlisted the general consensus, it is not compulsory, does not, in other words, constitute compliance with a rule. Up to that time the state may conceive itself to be voluntarily observing what it considers to be the best method of dealing with a particular situation. Yet it is this acknowledgment of the merits of the method which counts towards the general acceptance constituting the basis of the rule. If it were necessary, in order to prove the existence of a rule, to prove multiplied con-

[1] Pitt Cobbett: *Leading Cases on International Law*, 4th ed., Vol. I, p. 4.
[2] *System*, I, p. 34 sq.

scious compliances with it as something compulsory, international law would be a scantier system than it is.[1]

As for treaties, these can only occasionally, indeed very rarely in proportion to their number, be correctly described as constituting the origin of rules of international law. It is sometimes true of a given rule that it is a generalization of a provision laid down in some treaty. Thus, the rule "free ships free goods," which has only recently been established,[2] may be traced as far back as a treaty of 1650 between Spain and the United Provinces.[3]

But when treaties are said to be one of the main sources of international law this is not what is generally meant. They are so described as being, in the opinion of the writers, one of the principal modes of formation of rules, one of the principal forms in which rules of international law first appear as such. And in this sense the statement is inaccurate.

Unless the parties to a treaty laying down principles for guidance in the conduct of international affairs are so numerous that their adherence constitutes general consensus, those principles are not by their incorporation in the treaty constituted rules of international law. In spite of all the general conferences and open treaties of the last century, such universality has rarely been attained. Perhaps the Geneva Conventions of 1864 and 1906 on the care of the wounded may be cited with least diffidence as cases where it has. The Covenant of the League of Nations is a remarkably near approach. But the enormous difficulty of achieving express unanimity has hitherto prevented the treaty from playing any considerable part as "a first form" in which canons of international conduct make their appearance as universally compulsory rules.

As far as the parties are concerned, treaties may indeed set up rules of conduct, and the result is often described as international law. This has led to the admission by many writers of "particular international law" as distinguished from the general law which governs all the members of the family of nations. Some would even recognize three classes of international law, "particular," "general" and "universal," the

[1] Cf. Holland, *Jurisprudence*, Chap. v, I: "Usage, or rather the spontaneous evolution by the popular mind of rules the existence and general acceptance of which is proved by their customary observance, is no doubt the oldest form of law-making."

[2] It is assumed that the terms of the Declaration of Paris, 1856, may, since the Spanish-American war, be considered part of the customary law of nations. See *infra*, p. 29.

[3] Hall: *International Law*, § 255.

second class consisting of treaties ratified by "the majority of states, including leading Powers." [1]

It is submitted that such terminology, corresponding to an inaccurate analysis of the part played by treaties in the development of international law, reveals and tends to propagate a misconception of the whole system. The law of a community is the body of rules enforced upon its members by such power as the community has at its disposal. When two or more states enter into a treaty the provisions of their agreement do not become part of the law governing the community of states. It is not a rule of international law that state A shall pay yearly to state B a certain sum in reparation of damages. The rule of international law is that if state A enters into a treaty with state B it must comply with the terms of the treaty whatever they may be. By taking advantage of the law that treaties shall bind the parties, states A and B impose obligations upon each other. It is different with treaties ratified by all the members of the community, because the provisions of such treaties become, by the consent of all, rules for the whole community.

If the above definition of law is correct, then the phrase "particular international law" is a contradiction in terms, unless it means law which, having been enacted by the whole body of states, applies only to one or more specified members of the community. As for "general international law," that can only mean the system to which all states are subject, and the adjective is redundant.

It remains true that treaties play a very large part in the science of international law, though their provisions do not constitute rules of that law. They are one of the principal means of knowing what the law is, because they frequently record the assent of states to propositions which, when their progress towards general consent is complete, become law. Thus, the Declaration appended to the Treaty of Paris of 1856 records, with the accessions thereto, the consent of most of the important states of the world to the abolition of privateering, to the exemption from capture of non-contraband enemy goods on neutral ships, and to the principle that blockades to be binding must be "effective." Yet these principles, the character of which as law can scarcely now be contested, did not achieve that character solely by almost universal ratification or adhesion.

[1] e. g. Oppenheim, Vol. I, §§ 1 and 18.

One assent, and that of one of the greatest maritime powers, is recorded, not among the instruments of adherence, but in the instructions of the Department of State issued to American diplomatic representatives on the outbreak of the Spanish-American war.[1]

When the rule laid down in a treaty for observance by the parties thereto thus becomes generalized by subsequent express or tacit adoption, it ceases to be a mere conventional rule the breach of which furnishes grounds for complaint only to the other party or parties. General consent makes it part of the customary law, and its observance is claimed as of right by any member of the community of nations.

Treaties, then, are important to the international lawyer chiefly as evidence of consent, and so as marking steps in the process by which principles develop into rules. This function they share with actual practice, with the unilateral declarations found in official state documents, with the records of judicial decisions in prize courts or other national tribunals, and with the instructions issued by states to their military commanders and diplomatic representatives.[2] Evidence of a non-official and therefore less conclusive character is furnished by the works of the authoritative commentators.

There is a passage in Lord Coleridge's judgment in *Reg.* v. *Keyn*[3] which at least English authors of text-books might be expected to keep before them when dealing with the place of treaties in their general theory. "The law of nations is that collection of usages which civilized states have agreed to observe in their dealings with one another. What these usages are, whether a particular one has or has not been agreed to, must be a matter of evidence. Treaties and acts of state are but evidence of the agreement of nations and do not in this country at least *per se* bind the tribunals. Neither certainly does a consensus of jurists: but it is evidence of the agreement of nations on international points; and on such points, when they arise, English Courts give effect, as part of English law, to such agreement."

To sum up, the principles with which this article deals may be briefly stated as follows:

1. The cause of international law is the desire of states to

[1] Hyde, *op. cit.*, Vol. II, 762. [2] Cf. Hall, *International Law*, Introduction.
[3] *Reg.* v. *Keyn*, L. R. 2 Ex. D., pp. 151 *et seq.*, 202 *et seq.*

have the mutual relations which their social nature renders indispensable regulated with the greatest possible rationality and uniformity.

2. The basis of international law as a system and of the rules of which it is composed is the consent of states.

3. The origins of the rules of international law, which may also be called " the sources " of that law—though the word " source " has such a history of confusion behind it that it might well be abandoned—are the opinions, decisions or acts constituting the starting-point from which their more or less gradual establishment can be traced.

4. The records or evidence of international law are the documents or acts proving the consent of states to its rules. Among such records or evidence, treaties and practice play an essential part, though recourse must also be had to unilateral declarations, instructions to diplomatic agents, laws and ordinances and, in a lesser degree, to the writings of authoritative jurists. Custom is merely that general practice which affords conclusive proof of a rule.

A proper appreciation of the elements thus distinguished would materially assist in the ascertainment and exposition of the rules of international law, and, incidentally, in the further logical development of the system.

THE TREATY-MAKING POWER OF THE DOMINIONS

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In an earlier volume of the Year Book [1] the writer discussed the international status of the British Self-Governing Dominions with a view to showing that constitutional conventions regulating the status of the Dominions were having their repercussions in the sphere of international relations. It is inevitable and indeed advisable that the evolution of an international status for the Dominions should lag behind constitutional developments ; in fact there are those who say that internationally, except as regards the League of Nations, the Dominions have no status apart from the British Empire.[2] This is perhaps taking a somewhat narrow view, although it must be admitted that any international status they may have acquired is *sui generis* and has not yet reached a definitive stage. The Dominions are, of course, not sovereign states in International Law, but, just as in the past part-sovereign states, such as Bavaria within the German Empire and Bulgaria when under Turkish suzerainty, claimed a degree of international personality, so the Dominions as they have relations with foreign states both separately and as component parts of the British Empire cannot be ignored in International Law. Political facts inevitably tend to have legal consequences.

It cannot be claimed that there have been any outstanding developments in Dominion status within the last three years, but certain more or less vague conventions have tended to crystallize into definite rules. This process has been most marked in regard to the treaty-making power, and the Resolution of the Imperial Conference of 1923 [3] with regard to the negotiation, signature, and ratification of treaties affords a striking illustration of this.

It is not suggested that the Resolution covers all doubtful and controversial questions on the subject; on the contrary, as

[1] *British Year Book of International Law*, 1922–3.

[2] Keith : *Journal of Comparative Legislation* (1923), p. 160 ; Hall : *International Law* (8th edition), p. 35.

[3] *Imperial Conference, 1923 : Summary of Proceedings* (Cmd. 1987), pp. 13–15 ; *British Year Book of International Law*, 1924, p. 193.

Mr. Ramsay Macdonald has pointed out " it is by no means watertight, by no means definite," it requires " to be supplemented and interpreted." Nevertheless it does appear to form a foundation on which further conventions relating to the treaty-making power may be built, and it is proposed in the following pages to examine the Resolution in detail with a view to discovering its implications.

I

The Resolution draws a distinction between " treaties " and " agreements between governments," defining a treaty as " an agreement which in accordance with the normal practice of diplomacy would take the form of a treaty between Heads of states, signed by plenipotentiaries provided with Full Powers issued by the Heads of the states, and authorizing the holders to conclude a treaty."

A further distinction is drawn between bilateral treaties imposing obligations on one part of the Empire and those imposing obligations on more than one part. The provisions relating to the former type of treaty are as follows :

1. Negotiations :

(*a*) It is desirable that no treaty should be negotiated by any of the governments of the Empire without due consideration of its possible effect on other parts of the Empire, or, if circumstances so demand, on the Empire as a whole.

(*b*) Before negotiations are opened with the intention of concluding a treaty, steps should be taken to ensure that any of the governments of the Empire are informed, so that, if any such government considers that its interests may be affected, it may have an opportunity of expressing its views, or, when its interests are intimately involved, of participating in the negotiations.

2. Signature :

(*a*) Bilateral treaties imposing obligations on one part of the Empire should be signed by a representative of the government of that part. The Full Power issued to such representative should indicate the part of the Empire in respect of which the obligations are to be undertaken, and the preamble and text of the treaty should be so worded as to make its scope clear.

3. Ratification :

(*a*) The ratification of treaties imposing obligations on one part of the Empire is effected at the instance of the government of that part.

It is probably safe to say that the Canadian-American Halibut Fisheries Treaty was, if not the *causa causans*, at least the *causa sine qua non* of this part of the resolution. The story of that treaty is now familiar history and need not be set out at length.[1] The negotiations were conducted by Mr. Lapointe, the Canadian Minister of Marine, and Mr. Hughes, the United States Secretary of State, and in consequence of representations made by the Canadian Government, the signature of the British Ambassador did not accompany that of Mr. Lapointe, who thus signed as sole representative of His Majesty the King.

The Senate of the United States ratified the Treaty on the understanding that " the nationals of other parts of Great Britain " would be prevented from fishing halibut in the waters concerned, and this reservation caused a long delay in the final ratification of the treaty. The Canadian Parliament eventually passed legislation closing Canadian ports to vessels carrying on halibut fishery, and the treaty was then ratified by the United States without reservation.[2]

In estimating the importance of this treaty as a landmark in the progress of Dominion status, Professor Keith has pointed out that the British Government was informed of the contents of the treaty prior to its execution and that Mr. Lapointe was provided with full powers to sign the treaty, not for Canada, but simply generally. From these facts he has made the deduction that " the omission of the Ambassador's signature was an interesting change ; it did not alter in the slightest degree the international character of the instrument." [3] But with deference to so distinguished a constitutional authority as Professor Keith, it is difficult to accept this deduction. As far as the United States was concerned the treaty was definitely negotiated with Canada, and as soon as Canada was able to satisfy the Senate that legislation had been enacted to cover the question raised in the reservation the treaty was ratified by the United States. The fact that the British

[1] *British Year Book of International Law*, 1923–4, p. 168.
[2] *The Times*, October 29, 1924.
[3] *Journal of Comparative Legislation*, 1923, p. 167.

Government was informed of the contents of the treaty was a matter of inter-Imperial arrangement; its omission would not have affected the validity of the treaty. As far as any future treaties negotiated by a single Dominion are concerned the " preamble and text of the treaty " will be so worded as to make its scope clear, if the Resolution is to be adopted in practice. This will remind foreign governments, if any such reminder is necessary, that the treaty is not binding on the Empire as a whole but merely on one of its component parts. It will then indeed be difficult to deny that a Dominion negotiating such a treaty is devoid of international status.

Incidentally it may be added that the Resolution impliedly recognizes and approves of the precedent whereby treaties involving obligations on one Dominion only are signed by a representative of that Dominion without the necessity of the counter-signature of a representative of the British Government.

As far as the constitutional relations of the Empire were concerned the dangers of isolated action by a Dominion without proper consultation with other parts of the Empire were brought to light in the course of the history of the treaty, and may be assumed to be responsible for the clause in the Resolution of 1923 respecting negotiation already quoted. The Canadian Prime Minister has, however, pointed out that if the course recommended in the resolution is pursued, and other parts of the British Empire are kept in touch with the course of negotiations, " it will soon be apparent to any particular self-governing Dominion or the Government of the United Kingdom whether the treaty which it proposes to negotiate is one that concerns only one part of the Empire or more than one part. In these, as in all matters, common sense has to govern in the last degree; hard and fast lines cannot be laid down." [1]

In the course of a very interesting debate in the Canadian House of Commons on the relation of Dominion Governments to the Crown Mr. Meighen asked the question, " Upon whose recommendation does His Majesty act in authorizing the execution of a treaty by the appropriate Dominion representative? " and Mr. Mackenzie King replied that he could best illustrate the point of view which was expressed at the Imperial Conference of 1923 by recalling an answer made by Sir Cecil Hurst to a question that was asked by one of the Dominion Prime Ministers. " In the event of

[1] *Canadian Hansard*, Vol. 59, p. 574.

advice being given to His Majesty which might prove to be not proper advice, and the necessity should arise for impeaching the Minister or the Prime Minister who had given it, would it be," asked Sir Cecil, " the British Prime Minister or the Secretary of State for Foreign Affairs, or the Minister or Prime Minister of the Dominion concerned against whom impeachment proceedings should be properly started ? " [1] Mr. Mackenzie King added, " I gathered, I think rightly, that the interpretation which the Foreign Office placed on the matter is that the government of the Dominion which was tendering the advice in such a case was the government that was responsible ; that it was advising His Majesty directly in regard to matters which were of sole concern to the Dominion ; that in the transmission of that advice the British Government was acting as the channel through which that advice was transmitted, but was not the government which was formally tendering the advice." Mr. Meighen asked why, if the approval of the British Government was not essential and not obtained, the transmission should take place through the British Government. Mr. King replied that " these are all matters of constitutional development. Up to the present all communications have gone to His Majesty through the British Government. It will also be seen that it is obviously desirable to have some central agency or channel through which all communications may pass and where they may be noted. I think it would be palpably unwise to have different parts of the British Empire communicating direct with His Majesty without any knowledge on the part of other parts of the Empire that such advice was being given in that way." [2] Mr. Meighen challenged this statement and suggested that the function of the British Government would consist in making a recommendation ; having considered the terms of the treaty and being satisfied that the matter was principally the concern of Canada, the recommendation would be given cheerfully but it would " signify to His Majesty the approval of the British Government." Mr. King pointed out in reply that his understanding of the situation was arrived at after a conference with the British authorities and the Prime Ministers of the other Dominions in the presence of Lord Curzon, who, as Secretary of State for Foreign Affairs, presided at a subsidiary Conference for the purpose of considering these matters. He concluded, " I believe I have accurately stated the position ; it is certainly the basis upon which this government is

[1] *Canadian Hansard*, Vol. 59, p. 575 *et seq.*

[2] *Ibid.*, p. 575.

proceeding." This view put forward by Mr. Mackenzie King has never been authoritatively challenged and it may probably be accepted as a correct interpretation of the constitutional practice in the matter.

II

The Resolution of the Imperial Conference deals also with treaties involving obligations on more than one part of the Empire as follows :

1. Negotiations :

(*c*) In all cases where more than one of the governments of the Empire participates in the negotiations, there should be the fullest possible exchange of views between those governments before and during the negotiations. In the case of treaties negotiated at International Conferences where there is a British Empire Delegation, on which, in accordance with the now established practice, the Dominions and India are separately represented, such representation should also be utilized to attain this object.

(*d*) Steps should be taken to ensure that those governments of the Empire whose representatives are not participating in the negotiations should, during their progress, be kept informed in regard to any points arising in which they may be interested.

2. Signature :

(*b*) Where a bilateral treaty imposes obligations on more than one part of the Empire the treaty should be signed by one or more plenipotentiaries on behalf of all the governments concerned.

(*c*) As regards treaties negotiated at International Conferences, the existing practice of signature by plenipotentiaries on behalf of all the governments of the Empire represented at the Conference should be continued, and the Full Powers should be in the form employed at Paris and Washington.

3. Ratification :

(*b*) The ratification of treaties imposing obligations on more than one part of the Empire is effected after consultation between the governments of those parts of the Empire concerned.

> It is for each government to decide whether Parliamentary approval or legislation is required before desire for, or concurrence in, ratification is intimated by that government.

The part of the Resolution dealing with treaties imposing obligations on more than one part of the Empire gives rise to several important questions. In the first place it does not provide that the Government of each Dominion must be separately represented during the negotiation of treaties in which it is or may be concerned, although it is to have an opportunity of participating in the negotiations when its interests are intimately involved. There are occasions when Dominion Governments are content to leave the negotiation of a treaty to the British Government, provided they are informed as to the progress of such negotiations. Thus the Liquor Convention between His Majesty and the President of the United States was signed at Washington on January 23, 1924 by the British Ambassador, Sir Auckland Geddes, and Mr. Hughes, the American Secretary of State. The questions involved had been previously discussed at the Imperial Conference which decided to meet the American request [1], and the Dominion Governments all signified their acquiescence in having the British Ambassador sign the treaty for them in so far as their interests were concerned.

There will no doubt be numerous treaties in the future where a similar procedure will be adopted if the principles involved are not of the first magnitude. The Dominions are not yet diplomatically represented at the capitals of foreign states and accordingly for financial reasons alone this procedure will often be found convenient.

But where questions of the first magnitude are involved the resolution recognizes the constitutional convention that has come into being since 1918, that the British Empire Delegation to International Conferences must include delegates representing each Dominion. This principle was acceded to at the Peace negotiations at Paris and was followed at Washington. In each case there was one coherent British Empire Delegation on which each Dominion was represented, and the Delegation worked together in daily consultation. All the Dominions were represented in person at the plenary sessions of the Conference, while at the smaller and more informal meetings they were represented by the head of the Empire Delegation. It was presupposed as a matter of

[1] Cmd. 1987, p. 12.

course that the Dominion representatives would sign the resulting documents and that any treaties concluded would be submitted to Dominion Parliaments in order that they might approve of their ratification. But it is possible to interpret the effect of this procedure in international law too widely. Thus General Smuts in a speech in the Parliament of South Africa relating to the Washington Conference stated that " the American Government agreed that the Dominion representatives should not be the British representatives, or part of the British Delegation, but should be agents and representatives of their own Dominions, under the authorities of their own governments and should sign whatever treaties were concluded on behalf of their Dominions." [1] Unless General Smuts was using the term " British Delegation " in the sense of " Delegation for Great Britain " his statement does not correspond with the facts. Sir John Salmond in his report on the Washington Conference has described the procedure adopted as follows : " When any question came to be voted upon for the purpose of ascertaining whether there existed that unanimous consent which was necessary for a treaty the question was put to the British Delegation as a whole and was answered ' Yes ' or ' No ' by Mr. Balfour as the head and spokesman of that Delegation and on behalf of the British Empire as a whole. Although in the process of discussion and negotiation the representatives of the Dominion had and exercised the same right of audience as any other delegates they never voted separately on behalf of their own Dominions on any question." [2]

Even at the Genoa Conference, to which the Italian Government issued separate and direct invitations to the Dominions, there was one British Empire Delegation. This fact, however, does not alter the political and constitutional importance of the convention that the Dominions have a right to be directly represented on the Delegation. As all the delegates have equal votes it is clear that the representatives of the United Kingdom might be outvoted on any particular point by the Dominions and the vote of the British Empire Delegation might not represent the views of the Government of Great Britain ; and in any case the Dominions are able to influence the Empire policy to be adopted at these International Conferences. The presence of Dominion representatives is therefore a factor which foreign governments must take into account.

[1] *Journal of the Parliaments of the Empire*, Vol. III, No. 4, p. 907.
[2] *Ibid.*, p. 875.

It is to be regretted that at the London Conference on Inter-Allied Debts it was not found possible to adopt the procedure of Paris and Washington. Instead, it was arranged that representatives of Dominions so desiring should be members of the British Empire Delegation on the panel system, and that such representatives should be present at the meetings of the Conference on days when it was not their turn to sit as members of the Delegation. The Secretary of State for the Colonies in explaining this arrangement pointed out that " the plan adopted is a special one for this particular Conference and is not to be regarded or quoted as a precedent."[1] It may therefore be assumed that the British Government accepts the principle underlying the procedure at Paris and Washington although in this instance there was a departure from it. It is possible that if the Resolution of the Imperial Conference had been more definitive the difficulty would not have arisen. The dangers that lie in departing from the principle are illustrated by the correspondence between the Canadian and British Governments with regard to the Lausanne Treaty.[2] As no Canadian representative was invited to join the British Delegation at the Lausanne Conference the Canadian Government adopted the attitude that the British Government must have reached the conclusion that Canadian interests were not involved and that it would be inappropriate for any resolution to be moved in the Canadian Parliament approving of the ratification of the treaty.[3] The correspondence raises an interesting question. What would happen if a Dominion were to refuse to sign a treaty negotiated for the Empire as a whole, or if a Dominion Parliament were to disapprove of the ratification of such a treaty? If a Dominion manifested a repugnance to a treaty during the stages of negotiation it would be possible to insert a clause in the treaty excepting such Dominion from its provisions. If after the treaty had been signed a Dominion Parliament were to disapprove of its ratification it would presumably be necessary for His Majesty to make a reservation with regard to the Dominion in ratifying the treaty. Ratification by the King without reservations would of course make the treaty legally binding on the whole Empire, as Professor Keith points out, but it cannot be too strongly emphasized at the present state of the evolution of the British Empire that to insist

[1] *Journal of the Parliaments of the Empire*, Vol. V, No. 3, p. 499.

[2] *Correspondence with the Canadian Government on the Subject of the Peace Settlement with Turkey* (1924), Cmd. 2146.

[3] *Ibid.*, pp. 5 and 8.

on the legal aspects of the case and to ignore the constitutional aspects is fraught with danger to the future of the Empire. Constitutional conventions modify and control legal rights ; it would be legal but unconstitutional for His Majesty to ratify a treaty binding the Empire as a whole in the face of contrary advice offered by His Ministers in one or more Dominions, and it is highly unlikely that His Majesty would be advised so to do.

Fortunately in the case of the Lausanne Treaty the Canadian Government did not advise His Majesty not to ratify the treaty as far as it concerned Canada, it merely declined to offer any advice at all. Perhaps the Canadian attitude is best represented by the following extract from a speech of Mr. Mackenzie King in the Canadian Parliament : [1]

" We have never stated that the Lausanne Treaty would not bind the whole Empire . . . we have never questioned the fact that when the treaty was signed it would bind us. When His Majesty the King declared war, Canada was brought into war as a consequence of the declaration, and when the King ratifies the treaty, Canada will be brought out, just as she went into war, by the action of the Sovereign without any consultation with our Ministers in that regard. As to the extent of obligations arising between different parts of the Empire, in other words, considered inter-Imperially, in the carrying out of its provisions, the Government take the position that it will be for this Parliament to decide what, should occasion arise, in the light of all the circumstances, and in the light of the manner in which the treaty was negotiated, its obligations may be under the terms of the treaty."

This point of view may be summed up by saying that while Canada is bound by the treaty in point of law she does not hold herself bound to co-operate in its enforcement unless she is satisfied on the merits of the case that she ought so to do.

In the course of the correspondence on the Lausanne Treaty the Canadian Prime Minister laid down the following four essentials to be observed in the negotiation and ratification of treaties affecting the Empire as a whole at International Conferences : [2]

(i) That Canada should be directly represented at such Conferences by a representative who should participate in the proceedings of the Conference. The appointment of such representative should be effected by Full Powers signed by His Majesty the King in the form of Letters Patent authorizing him to sign any treaties or conventions to be

[1] *Canadian Hansard*, Vol. 59, p. 3046.
[2] *Ibid.*, p. 7.

concluded for and in the name of His Majesty the King in respect of the Dominion of Canada, the Canadian Government having by Order in Council sanctioned the issuance of such Full Powers.

(ii) That the plenipotentiaries so appointed should formally sign any treaties so negotiated on behalf of Canada.

(iii) That treaties so signed should be submitted to the Canadian Parliament for approval.

(iv) That the Canadian Government should signify its assent as respects Canada to the final act of ratification by the King.

These, of course, were the steps taken at Paris and Washington, and it is in the interests of the cohesion of the Empire that they should be taken on similar occasions in the future ; to depart from them is to jeopardize cordial relations between the Dominions and the British Government and to weaken the voice of the British Empire in World Councils.

But do the principles involved in this procedure give to the Dominions any international status ? When His Majesty the King ratifies a treaty concluded at an International Conference he does so by one comprehensive act. He does not ratify separately for each Dominion. This at first sight appears to be conclusive against the existence of any international status of the Dominions in such matters. But suppose one Dominion refused to approve of the ratification of the treaty as far as related to it, there would presumably be two and only two alternatives, either to refrain from ratifying the treaty at all or to ratify it with a reservation excepting the recalcitrant Dominion from its provisions. In the latter case would the power of excepting itself from such a treaty give the Dominion any international status ? Possibly not, but the question is at least interesting and must be taken into account as a political factor that may influence the rules of international law.

III

The second part of the Resolution of the Imperial Conference deals with informal agreements other than treaties as above defined. It reads :

" Apart from treaties made between Heads of states, it is not unusual for agreements to be made between governments. Such agreements, which are usually of a technical or administrative character, are made in the names of the signatory governments, and signed by representatives of those governments,

who do not act under Full Powers issued by the Heads of the states ; they are not ratified by the Heads of the states, though in some cases some form of acceptance or confirmation by the governments concerned is employed. As regards agreements of this nature the existing practice should be continued, but before entering on negotiations the governments of the Empire should consider whether the interests of any other part of the Empire may be affected, and, if so, steps should be taken to ensure that the government of such part is informed of the proposed negotiations, in order that it may have an opportunity of expressing its views."

This part of the Resolution is restrictive rather than enabling. For some twenty years the Dominions have entered into informal agreements with foreign states, the negotiations being conducted directly with the Consular Officers accredited to the Dominion Governments. Australia led the way in this respect by negotiating an agreement with the Japanese Consul in the Commonwealth for certain facilities of transit and trade for Japanese merchants, students and tourists,[1] and Canada subsequently entered into a number of important but informal agreements on commercial matters with the Consular Officers of foreign states at Ottawa [2] (the latest example of such an agreement is that negotiated between Canada and Belgium in July, 1924).[3] The agreements have taken the form of concurrent legislation on the part of the contracting parties in order to avoid the necessity for formal ratification.

The Resolution recognizes the propriety of this practice but offers a salutary suggestion that a Dominion contemplating the conclusion of such an agreement should consider whether the interests of other parts of the Empire might be affected by it, and, if so, should inform them of the contemplated action and give them an opportunity of expressing their views.

IV

It is believed that this short review of the Resolution of the Imperial Conference of 1923 will emphasize the fact that its effect is to consolidate rather than to advance the position of the Dominions in respect of the treaty-making power. But the writer is of opinion that the Resolution does not represent the last word on the subject ; the recognition of the fact that the Dominions have the right of appointing diplomatic representatives in foreign

[1] Keith : *Responsible Government in the Dominions*, p. 1133.
[2] *Canada, Sess. Papers*, 1910, Nos. g, h, i, j.
[3] *The Times*, July 5, 1924.

capitals, first given in the case of Canada and confirmed in the case of the Irish Free State, may yet produce new constitutional conventions emphasizing Dominion autonomy; to those who prophesy that any further relaxations of Imperial control may bring about the disruption of the Empire, it may be pointed out that similar prophesies were made by Lord John Russell at the time of the suggested grant of self-government, and by Lord Ripon when the Colonies were given the right of entering into separate commercial agreements; it was for many years the accepted doctrine that there could be only one commercial policy for the Empire, but that doctrine has been exploded and yet the Empire still stands. Political problems are in many cases but another phase of economic issues and in actual fact there cannot be in all cases a united foreign policy for the Empire; it is so scattered that the interests of its component parts must necessarily clash in many matters. Thus the attitude of the Canadian Government in respect to Japanese immigration has been in such hopeless conflict with the policy of the British Government that Canada has found it necessary to enter into a special agreement with Japan in the matter.

The evolution of the British Empire is not complete and the growth of new constitutional conventions may yet modify the international status of the Dominions. As an acute foreign observer has said: [1]

"It may be asked if the status of the Dominions is not in process of evolution; if it is still in 1923 what it was in 1914. There is the more propriety in putting this question in that the innovations introduced in the constitution of the British Empire and their international consequences need not necessarily result in legislative texts or conventions. Practice, the origin of new customary principles, plays an important rôle in this sphere. One must attempt to grasp at each moment the product of diverse and changing factors, to distinguish the conceptions recognized by all parties interested, that is to say, law, from those political tendencies and notions peculiar to one or other of the parties to the case; these tendencies and notions are merely facts. It is extremely difficult to draw the distinction in a matter where it is peculiarly true to say that *ex facto oritur ius.*"

[1] M. Henri Rolin: *Revue de Droit International et de Législation Comparée*, 3rd Series, Vol. IV (1923), Le Statut des Dominions, p. 197.

THE EXERCISE OF CRIMINAL JURISDICTION OVER FOREIGNERS

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THOUGH the exercise of criminal jurisdiction over foreigners has been the source of a certain number of international incidents like the cases of Cutting or of the Costa Rica Packet, yet on the whole their fewness is surprising, when one takes into consideration the very wide divergences of opinion held by different states, as exemplified in their laws, as to the extent of their powers of jurisdiction over non-nationals. For on the one hand the existence of a municipal code authorizing the prosecution in no way serves as an excuse for a state which has exceeded its rights by the law of nations and has to meet the indignation of a neighbour, and on the other the "séparation des pouvoirs," which to a greater or less extent is embodied in the polities of most states, often leaves the executive powerless to interfere with the due enforcement of the penal laws of the land by the officers of justice.

It is, of course, universally accepted that no state can perform acts of sovereignty inside the territory of another, nor can it send its officials on to foreign soil to arrest, try, or punish offenders there, whoever they may be or whatever they may have done. The enjoyment of foreign jurisdiction under capitulations or other treaties of that kind in foreign territory stands purely on the basis of international convention and as an exceptional state of affairs. The question is simply when and for what offences a country has the right to try and punish aliens, when it finds them within its borders. This inquiry is as to the extent of jurisdiction in such cases and has nothing to do with abuses of jurisdiction over or denials of justice to foreigners, which are derogations of the international duty to treat foreigners fairly and impartially with nationals and to maintain an adequate machinery for the protection of their rights. Nor again does it in any way relate to the law which the tribunal which tries an

alien should apply to the case, to the regard which it should pay to the law of his national state or the law of the place where he was when he committed the offence, or to the extent to which this tribunal should allow the proceedings to be affected by the fact that the offender has been tried and convicted or acquitted for this same offence by the courts of another country. The principle " Ne bis in idem " is not one which has any bearing on the question of jurisdiction or no jurisdiction, though it may be relevant to a question of abuse of jurisdiction, or of disregard of international comity.

The jurisdiction, which a state chooses to exercise over its own nationals in relation to acts performed at home or abroad, can never be the concern of any other state and is therefore quite outside the sphere of international law. On the other hand, an abuse or excess of jurisdiction over aliens is an infringement of the rights of their national states, against which, by virtue of the right which every state possesses to protect its citizens abroad, they are entitled to protest. The extent of a state's criminal jurisdiction over foreigners is a matter which must be determined by the law of nations.

It is now a generally recognized and accepted rule of international law that a state possesses the right of trying and punishing aliens for all infractions of its penal laws committed inside its territory. The question is whether this is the full extent of its jurisdiction over them. There is certainly a recognized right (and it is sometimes said an international duty) to punish aliens for the crime of piracy on the High Seas, which is unaffected by the nationality of the ship on which they are sailing. The crime of piracy, however, only attaches to acts of violence committed without the authority of any political community and pirates are said to be " hostes humani generis " and by their acts to have put themselves outside the protection of any state. Piracy stands on such an exceptional basis that it throws no light on the question of penal jurisdiction generally.[1] The view, that the jurisdiction of states is limited by the law of nations to crimes committed on their territory, may be described as " the strict territorial theory " and is supported amongst the Great Powers by the British Empire and the United States. In defence of this principle the latter country at the close of the

[1] Piracy stands alone in this category by the common law of nations, though by convention certain other offences have been placed in the same position.

last century came into conflict with the Republic of Mexico, which produced the "leading case" on the subject—the case of Cutting.[1]

The case is indecisive to the extent that both parties adhered to their positions and the matter dropped without any arbitral decision. The point of interest was whether by Art. 186 of her Penal Code, Mexico was arrogating to herself a jurisdiction which was unjustifiable by international law. By that article

[1] See Moore, *International Law Digest*, Vol. II, § 201, for the contentions of the U. S., and the *Foreign Relations of the U. S.* (1888), Vol. II, pp. 1114 *et seq.*, for the Mexican case. The memorandum of John Bassett Moore which was transmitted to the Mexican Government, analysing the practice of states with regard to jurisdiction over aliens, is printed in an abbreviated form in Moore, *l. c.*, § 202.

A length of the Rio Grande forms the boundary between the state of Texas and the state of Chihuahua of the Mexican Republic. On the Texas side is the town of El Paso and on the other bank the town of El Paso del Norte. Richard Cutting, an American citizen, who resided intermittently at El Paso del Norte, had a quarrel with a Mexican citizen of that town, Emigdio Medina. He had published in El Paso del Norte a statement casting serious reflections on Medina, which had been followed by proceedings, which appear to have been of a civil character, in the Mexican courts in the course of which Cutting had been obliged to publish a withdrawal and apology. He then almost at once, on June 18, 1886, published in a newspaper of El Paso, on the other side of the border, another statement repudiating his apologies and making fresh charges against Medina. On June 22, when in El Paso del Norte, he was arrested at the instance of Medina on a charge of criminal libel, based on the publication of June 18, and imprisoned. His release was demanded by the U. S. consul on the ground that the Mexican court had no jurisdiction in respect of a publication in a Texas newspaper by a U. S. citizen. The charge was then amended and he was tried and convicted of criminal libel on three alternative grounds:

1. The circulation of the Texas newspaper in El Paso del Norte.
2. The previous publication in El Paso del Norte which had been the subject of the previous proceedings.
3. The publication in the Texas newspaper under Art. 186 of the Mexican Penal Code.

The State Department at Washington took the matter up and an appeal on the ground of want of jurisdiction was entered to the Supreme Court of Chihuahua. Cutting was released pending investigations, during the course of which Medina abandoned the proceedings. The matter was, however, for two years the subject of an exchange of notes between Washington and Mexico City. Mr. Bayard demanded payment of compensation on account of Cutting's imprisonment, and the amendment of the Mexican criminal code as being contrary to International Law and the probable source of future differences. He brushed aside the first two grounds, on which the conviction purported to be based, as never having been included in the original charge and mere afterthoughts, inserted in the attempt to justify an otherwise unjustifiable assumption of jurisdiction over an American subject, and concentrated his attack on Art. 186 of the code. M. Mariscal, the Mexican Foreign Minister, in his reply, though relying on the first two alternative grounds as a defence to the demand for compensation, was also chiefly concerned with Art. 186, whose validity by the law of nations he sought to uphold. He never took the point that in view of the close contiguity of the two towns the publication in the Texas paper would inevitably and was intended to produce its effects in the city of El Paso del Norte, where, in view of Cutting's presence there, it would be calculated to provoke disorders rather than elsewhere.

the courts of Mexico were given jurisdiction in respect of penal offences committed in a foreign country by a foreigner against a Mexican citizen subject to the following (amongst other) conditions :

(*a*) The accused being apprehended in the Republic.
(*b*) The accused not having been tried in the country where the act was committed.
(*c*) The act being criminal by the lex loci delicti commissi.
(*d*) The act being both criminal and subject to a severer penalty than " arresto mayor " by Mexican law.

Mr. Bayard contended that the strict territorial doctrine was that accepted by the law of nations. A large number of writers,[1] mostly British and American, and the practice of these two Powers [2] support his contention. M. Mariscal, the Mexican Foreign Minister, relied upon the fact that the practice of states, as attested by their criminal codes, was not uniform and the opinions of publicists not unanimous, and that therefore it could not be maintained that the jurisdiction claimed by his country was contrary to the law of nations. It was the fact that at the time of the controversy Greece and Russia possessed in their codes provisions giving jurisdiction of the same kind as that

[1] For example Hall (8th ed.), § 10 and § 62 ; Oppenheim (3rd ed.), Vol. I, § 147, p. 240 ; Phillimore : *International Law* (3rd ed.), Vol. I, pp. 454–8 ; Westlake : *International Law*, Part I, p. 251 ; Moore, *l. c.*, § 202 ; Heffter : *Le Droit Int. de l'Europe* (4th ed.), p. 85 § 36 ; Wheaton, 8th ed. (Dana), § 113 (p. 179) ; Albéric Rolin in the *Revue de D. I.*, Vol. XX, at p. 568. In an article on *L'Affaire Cutting* this writer strongly supports the strict territorial view.

[2] The British practice is uniformly consistent with the strict territorial doctrine except for a rather curious provision contained in section 687 of the Merchant Shipping Act, 1894. " All offences against property or person committed in or at any place either *ashore or afloat out of H. M. dominions* by any master, seaman, or apprentice, who at the time when the offence is committed *is, or within three months previously has been* employed in any British ship, shall be deemed to be offences of the same nature, &c. . . . and to be tried in the same manner and by the same courts as if those offences had been committed within the jurisdiction of the Admiral in England." (Quoted by Holland, *Studies in International Law*, as amongst acts which may turn out to be internationally controvertible.)

The U. S. practice is entirely in accord with the strict territorial doctrine, unless either (i) the decisions of her courts in the *Comm.* v. *Macloon* and *Tyler* v. *The People* (see note 2, p. 53 *infra*) are an attempt to stretch it too far, or (ii) § 24 of the statute of 1856 (Revised Statutes, § 1750) (making perjury in affidavits or in evidence on commission taken by U. S. consular officers abroad punishable by U. S. courts irrespective of the nationality of the offender) goes outside it. Such false evidence, however, must produce in every case some of its effects in the United States for whose courts it is required and the statute is probably justified on that ground.

claimed by Mexico. Since that date both Brazil [1] and China [2] have taken powers to the same effect. Italy [3] has somewhat similar provisions in her code with respect to crimes against Italians abroad, but this jurisdiction seems to be looked upon as a reserve or extraordinary jurisdiction, for it is provided that, except in the cases of offences committed within three miles of the frontier, it shall only be exercised if and when an offer of extradition has been made to the state in which the crime was committed, and has been refused.

Norway [4] and Sweden have similar provisions but subject to the consent of the executive to the proceedings, a precaution which enables the Government, if they wish, to avoid conflicts with powers who adhere to the strict territorial doctrine and perhaps indicates no special confidence in the validity by international law of the jurisdiction therein asserted. Apart from these instances M. Mariscal was able to adduce others, where the penal codes of nations departed from the strict territorial view.

Thus Austria,[5] Hungary,[6] Italy,[7] and the Argentine [8] make crimes (felonies not misdemeanours) committed by foreigners abroad, whether against their nationals or not, justiciable by their tribunals, if the criminal enters the country, provided that

[1] Law No. 2416 of June 23, 1911, Art. 14 : " Pourront être poursuivis et jugés au Brésil le Brésilien et l'étranger qui auront commis en territoire étranger un crime contre un Brésilien, crime puni par la loi Brésilienne d'une peine de prison de deux ans au minimum. Le procès contre le Brésilien ou l'étranger ne sera intenté que sur la requête du Ministre de l'Intérieur ou sur la plainte de la partie lésée, lorsque dans le cas où l'extradition sera permise elle ne sera pas sollicitée par l'État sur le territoire duquel l'infraction aura été commise." (Translation of Travers, *Le Droit Int. Pénal*, Vol. I, p. 538.)

[2] Chinese Criminal Code, Art 5. It goes further than any of the others.

[3] Italian code, Art. 6 (1).

[4] The Norwegian Code, Art. 12. Art. 12 (3) of that code is remarkable in assimilating persons domiciled in Norway to nationals with reference to the jurisdiction of her courts over certain crimes committed abroad. *Kotza's case* and the comments of publicists upon it may be referred to, as showing that such jurisdiction is likely to be disputed.

[5] Austrian Criminal Code, Arts. 39 and 40 : " L'étranger qui a commis à l'étranger un crime autre que ceux désignés dans les articles précédents [i. e. contre la sûreté et le crédit de l'État] doit toujours être arrêté lors de son arrivée en Autriche et l'on doit s'entendre immédiatement pour son extradition avec l'État où le crime a été commis. Si l'État étranger vient à refuser de s'en charger, il doit être procédé contre le criminel étranger en principe d'après les prescriptions du présent code pénal." (Translation of Travers, *l. c.*, p. 567.)

[6] Hungarian Criminal Code, Arts. 9 and 16.

[7] Italian Criminal Code, Art. 6, al. 3.

[8] Argentine, La loi du 25 April 1885, Art. 5.

extradition has been offered to and refused by the state possessing territorial jurisdiction, though, in the case of Hungary, proceedings will only be taken on the authority of the Minister of Justice. Such provisions proceed on the high moral basis that though the courts of the "locus delicti commissi" are the proper tribunals and have the prior right, criminals must not go unpunished for want of courts able and willing to try them.

Again, France,[1] Germany,[2] Austria, Belgium, Holland, Hungary, Italy, Norway, Russia, Sweden, Greece, Brazil, Spain, Switzerland, Japan, and Chili, all have provisions giving their courts power to punish aliens for acts committed abroad, which are directed against the safety of the state or its financial credit. These provisions appear as exceptions to the general principle of strict territorial jurisdiction which is enshrined in the codes

[1] The French view is well illustrated by the judgment of the Cour de Cassation in the case of *Fornage* reported in the *Journal du Palais*, 1873, pp. 299 *et seq.*, and summarized by Moore, *l. c.*, p. 262, whose summary is quoted. Raymond Fornage was indicted by the Chambre des mises en accusation (grand jury) at Chambéry for larceny, described in the charge as having been committed in Vaud, Switzerland, and the case was referred for trial by jury before the Assize Court of Haute-Savoie. He did not (as he might have done) appeal against the committal by the Chambéry court on the ground of absence of jurisdiction but took before the Assize Court an objection to the competency of the Court on the ground that he was a foreigner and was accused of an act committed abroad. The Assize Court held that they could not entertain such a point since the committal by the Chambéry tribunal stood and had not been appealed against. Fornage appealed to the Cour de Cassation, which annulled the decision of the Assize Court.

The judgment contains the following passage: (After stating that courts of assize are, when seized of a case by the committal of a "chambre des mises en accusation," invested with jurisdiction over all acts punishable by French law and cannot therefore in general entertain any objection to their competence) "but this jurisdiction . . . cannot extend to offences committed outside the territory by foreigners, who, by reason of such acts, are not justiciable by the French courts, seeing that indeed the right to punish emanates from the right of sovereignty, which does not extend beyond the limits of the territory; that except in the cases specified in Art. 7 of the Code of Criminal Procedure, the provision of which is founded on the right of legitimate self-defence, the French tribunals are without power to judge foreigners for acts committed by them in a foreign country; that their incompetence in this regard is absolute and permanent: that it can be waived neither by the silence nor by the consent of the accused; that it exists at every stage of the proceedings."

Act 63 of the French "Code du Travail," livre II, contains a small and unimportant exception to the general French practice. It renders persons justiciable by French courts who have been guilty of offences punishable by French law of employing children in theatres and circuses, even when committed abroad by foreigners if the children are French.

[2] In the case of Richard Braeg (1880) the German court at Constance acquitted Braeg on the ground that the offence was committed on foreign soil by a person not a German. It was only reversed by the Supreme Court at Leipzig on the ground that he was a German. (Moore: *Digest*, Vol. II, § 200.)

of most of these countries. Great Britain, the United States, Denmark, and Portugal adhere strictly to the territorial theory.

Amongst writers, the Spaniard Riquelme,[1] has expressed views which support the jurisdiction claimed by Mexico in the case of Cutting, and Fauchille seems also to be in favour of it. Woolsey rejected the territorial doctrine as the principle governing criminal jurisdiction, while the Institute of International Law, which twice devoted part of its discussions to the question,[2] accepted the territorial doctrine but on each occasion passed a resolution [3] making crimes against the safety and credit of the state an exception to the general rule, a view which is followed by many continental publicists.[4]

Now a rule or an exception to a rule of international law can only be made by the general consent of all members of the family of nations, and in such an apparent conflict of opinion the vital question is "On whom is the burden of the proof? Who must show that the general consent of nations is on his side, he who asserts jurisdiction over aliens or he who denies it?" Framed in this way there seems to be only one possible answer—"He who claims jurisdiction." The opposite answer would involve the proposition, that either there was no limit by international law to a state's jurisdiction over aliens—and there is at any rate sufficient unanimity of opinion to assume that this is not so [5]—or that states formerly possessed unlimited rights,

[1] Riquelme, Bk. II, Title 2, Chap. 2; Woolsey: *Introduction to the Study of Int. Law*, § 76; Fauchille: *Traité du Droit Int.*, Vol. I, § 442 (26).

[2] 1879 Brussels: 1883 Munich. *Annuaire*, 1883–5, pp. 123–60, Conflit des lois pénales.

[3] "Tout état a le droit de punir les faits commis même hors de son territoire et par des étrangers en violation de ses lois pénales, alors que ces faits constituent une atteinte à l'existence sociale de l'état en cause et compromettent sa sécurité et qu'ils ne sont point prévus par la loi pénale du pays sur le territoire duquel ils ont eu lieu." Westlake opposed this resolution at both meetings.

[4] Paul Fauchille: *Traité de Droit International* (*Paix*), § 442 (26). Massé: *Le Droit Commercial*, Vol. I, § 524.

[5] An ingenious argument advanced by M. Mariscal in *Cutting's case* would in fact go to this length. He quoted Phillimore: "It is a received maxim of Int. Law that the Government of a state may prohibit the entrance of strangers into the country and may therefore regulate the conditions under which they shall be allowed to enter it" (I. L., Vol. I, p. 233). He then continued, "If, therefore, the state has the right to impose conditions on the entrance of foreigners into its territory, one of the conditions could well be that upon entering its bounds the foreigner should be held responsible under the legislation of the land, for the offences he may have committed while abroad against the citizens of the state." The *conditions* to which Phillimore refers do not mean *any conditions*: if they did, by the same argument, compulsory naturalization or service in the army could be made conditions by the legislation of the land. The conditions referred to are such things as passport regulations, registration of aliens, &c., &c.

which by common consent they have relinquished in certain cases at some period of history. It is always a difficult matter to prove an abandonment of a right by mere non-user, and in this case, in view of the differences in the criminal systems of states, it would be difficult to discover any kind of jurisdiction which is not apparently claimed by some state to-day. Such a view would involve the almost insuperable difficulty of deciding at what point of time the practice of states must be looked at in order to discover a common forbearance in relation to some class of offences. It is moreover unhistorical. The history of all laws opens with an entirely personal conception of law: every man possessed only the rights and duties with which the laws of his own tribe, city, or class invested him, and could not be judged by any other. The expansion of the Empire of Rome to the limits of the known world robbed this idea of all practical importance rather than destroyed it. It revived in full force in the Middle Ages, when feudalism subjected every man to the jurisdiction of the lord to whom he owed allegiance in return for the protection to which he was entitled. Jurisdiction was then founded upon allegiance. The merchants, the only people besides envoys and armies (and they have to this day retained immunity from any but national jurisdiction) who were often to be found on foreign soil, had their own laws and courts peculiar to them as a class. It was contrary to the whole trend of thought of the time to suppose that the local laws or tribunals of the places they visited could be applicable to them. The jurisdiction of the consuls in the East, who possessed full competence in civil and criminal matters over their countrymen in the second half of the Middle Ages, was adopted also in the West in relation to merchants, and ambassadors frequently exercised the powers of condemning to death subjects of their sovereign, who had committed offences in the country, to which they were accredited.[1]

The development of the modern state on a territorial basis put an end to the exercise of jurisdiction on foreign soil and subjected aliens to the courts of the state on whose territory they were resident. The theory of allegiance as the source of jurisdiction remained, and nationality became the source of allegiance: jurisdiction over resident aliens was made to fit in with the old doctrine, on the ground that such persons owed a temporary allegiance by reason of their residence, in return

[1] See Oppenheim, Vol. I, p. 588.

for the temporary protection they received from the state on whose land they were permitted to come. This theory is undoubtedly true as a matter of history and has been recognized by the law of nations. History is sufficiently conclusive that jurisdiction over foreigners is not innate in the theory of the state but has been recognized later by the assent of nations.

The theory of allegiance—permanent or temporary—as the sole source of jurisdiction is still asserted by many British and American writers,[1] though Great Britain and America exercise the right which it gives them to punish their nationals for offences committed abroad less than most other countries. The assumption, however, by such a large and influential body, of powers of jurisdiction which cannot be justified by this theory, demands investigation to see if, without departing from the view that any lawful exercise of jurisdiction must be based on the common consent of nations, including therefore these two countries, modern developments have not altogether outrun the theory, which, as a criterion of modern practice, must now be scrapped as obsolete. Hitherto in describing the strict territorial doctrine the ambiguous phrase " offences committed within their territory " has been used. This may cover two entirely different classes of cases :

(*a*) Where a man physically present inside the boundary commits an act which is a criminal offence by the law of the country where he is at the moment.

(*b*) Where a man, without ever entering the territory himself, commits an act, which produces harmful effects inside the state.

Firing a gun across the frontier is only the baldest and most obvious example of the second type of case. Infernal machines or swindling letters may be sent by post, and harmful results may be produced by the actions of agents (perhaps entirely innocent) directed by the criminal, who remains in another country. Now a foreigner, who never crosses a state's frontier, has certainly never received any protection from its laws and has never been " subditus temporarius " ; he owes no allegiance. Therefore if the allegiance theory is the criterion of jurisdiction,

[1] See for example Oppenheim, *l. c.*, p. 240 ; Phillimore, *l. c.*, p. 454 ; Hall, *l. c.*, § 10, and the argument presented on behalf of Great Britain in the *Costa Rica Packet Arbitration*, British and Foreign State Papers, Vol. 89, p. 1185.

he is not justiciable for such crimes, though he take the next boat across in order to watch the results of his schemes.

Neither Great Britain [1] nor the United States [2] permit this. Both countries themselves assume and recognize the right of other states [3] to exercise jurisdiction over crimes committed by aliens while abroad, which produce their direct results inside their territory. Allegiance as the foundation of jurisdiction has been in fact abandoned even by these countries.

The statement of Hall,[4] " But as jurisdiction over the latter [sc. aliens] is set up as a consequence of their presence, it begins with their entrance and ceases with their exit . . . it can only be exercised with reference to such acts as have been accom-

[1] Coke : *Institt.* 2. 318 : " An indictment alleging the stroke at one day and place and the death at another day and place, is good if it alleges the murder or manslaughter to have been at the time and place of the death but bad if it alleges that the dft. killed and murdered the deceased at the place and day where the stroke was given." *Seven Bishops' case*, 12 *State Trials*, 331 : " If a man being in one place circulate a libel in another, he is answerable at the latter place." *R.* v. *Combs*, 1 Leach, *Cr. Cases*, 432 : Where a man in a boat at a short distance from the shore was shot at by a person on the shore, it was held that both the stroke and death were on the high seas. *R.* v. *Veltheim* (unreported ; see Russell on *Crimes*, Vol. I, p. 55, 8th ed.) : an alien, while in Hungary, gave letters containing menaces to an agent, who posted them in Russia addressed to England and they were received there. He was convicted under § 44, Larceny Act 1861. *R.* v. *Oliphant* [1905], 2 K. B. 67. *R.* v. *Nillins*, 53 L. J. M. C. 157. Extradition ordered of a man, who had obtained money by false pretences contained in letters sent to Germany. Cave J. : " It is clear that there may be cases where a person has committed a crime in a foreign country without even having been there."

[2] *U. S.* v. *Davis* (see note 5, p. 54 *infra*) ; *Adams* v. *The People*, Comstocks R. (N. Y.), 173, 9 ; *Comm.* v. *Macloon et al.* 101 Mass. 1869. In this last case three members of the crew of a British ship beat and starved X, a member of the crew, while on the High Seas, in such a manner as to cause his death shortly after the ship arrived in port at Chelsea, Mass. Two of the three prisoners were British subjects. They were both convicted by the Mass. courts under a statute on the ground that the death having taken place in the state the manslaughter took place there. Decision followed in *Tyler* v. *People*, 8 Mich. 320 (Campbell J. dissenting), but not followed in New Jersey. *The State* v. *Carter 3 Dutcher 499.* This decision carries the doctrine of Objective Territorial Jurisdiction very far—perhaps too far. Moore (*l. c.*, p. 255) seems rather to doubt its correctness. In this case, when the act was done, both the criminals and the victim were out of the jurisdiction. Where the victim dies a lingering death and wanders off before dying to one place or another, it seems to be an over-refinement of the doctrine to say that the offence was committed at the place where he died. The English courts in *R.* v. *Lewis*, 7 Cox C. C. 277—an exactly parallel case under a very similar statute (9 Geo. IV, c. 31, § 8)—evidently felt this. Coleridge C. J. held " that the section ought not to be construed as making homicide cognizable in the courts of this country, unless it would have been so cognizable at the place where the blow was given. The homicide in this case would have been by the 7th section so cognizable if the offender had been a British subject but not otherwise."

[3] See *Poublé's case*, Moore, *l. c.*, p. 228, Mr. Bayard to Mr. Wallace ; *Cutting's case*, Moore, *l. c.*, p. 231, Mr. Bayard to Mr. Bragg.

[4] Hall : *International Law* (8th ed.), § 10.

plished, or at least begun, during the presence within the territory of the persons doing them," does not tally with the practice of any state.

John Bassett Moore in the memorandum drawn up by him with reference to *Cutting's case* [1] says :

"And it may also be granted that a nation may, under proper limitations, punish offences committed within its territory by persons corporeally outside. It is true that in the case of an offence committed within the territory of one state by a person inside another state, there may be a concurrent jurisdiction, the former state having jurisdiction by reason of the locality of the act, the latter by reason of the locality of the actor."

He says this jurisdiction is recognized by the jurisprudence of all nations.[2] He describes the two cases as being two types of territorial jurisdiction ; the former he calls Objective and the latter Subjective territorial jurisdiction. The subjective territorial jurisdiction appears to be also recognized in English criminal law [3] and in most other systems [4] when any overt act is committed inside the territory, though American decisions seem to have tended to exclude it in favour of the objective theory.[5]

[1] Moore, *l. c.*, § 202.

[2] France adopts this principle; see Travers, *Le Droit Pénal International*, Vol. I, p. 134.

[3] *R.* v. *Holmes*, 12 Cg. B. D. 23. H. wrote and posted at Nottingham a letter addressed to G. in France, containing a false pretence by means of which he induced G. to transmit to Nottingham a draft for £150 which H. cashed there. He was convicted. Cp. *R.* v. *Most*, 7 Cg. B. D., 244.

[4] France does so ; see Travers, *l. c.*, at p. 184 : " L'infraction est considérée commise en territoire français dès que s'est réalisé sur ce territoire en tout ou en partie, soit un élément constituant de l'infraction, soit un fait influant sur la qualification ou la quotité de la peine et tenant à l'activité de l'agent."

[5] In *U. S.* v. *Davis* (1837), Sumner, C. C. 482, the defendant, a master of an American ship, stood on his deck and shot and killed a man on board a foreign vessel. Both ships were in the territorial water of the Friendly Islands. Story J. held that the American court had no jurisdiction. The crime was committed in the contemplation of law where the shot took effect. It made no difference to the case whether the victim was a citizen or a foreigner.

The Institute of International Law at Munich (see note 2, p. 50) adopted resolutions which would exclude the Objective theory except in cases of crimes "contre la sûreté et le crédit de l'état" and adopted the subjective view exclusively. Art. I. "La compétence . . . de la loi pénale est celle du pays où se trouve le coupable lors de son activité criminelle." Art. 2. "La justice pénale d'un pays dans le territoire duquel se réalisent ou devaient se réaliser, selon l'intention du coupable, les effets de son activité, n'est pas compétente à raison de ces effets seuls." See also Art. 3 (1). This view (which produces the same results as the allegiance theory) is based (as explained in the report of MM. Bar and Brocher) upon the theory of culpability, i. e. that a man is supposed to possess a knowledge of the laws of his own country or of the laws of any place where he is, but not of any other country's laws—a theory which seems very academic and far from reality.

The importance of the recognition of the objective theory by the defenders of the strict territorial doctrine can from the point of view of international law hardly be over-estimated. It may serve to reconcile many cases of conflict between the views taken by these powers and those adopted by continental countries.

What is the true basis of such jurisdiction ? It has been seen that the allegiance theory will not serve. It seems that it must be founded on the basis of a right of self-defence. Everything which produces as its direct results harmful consequences inside its boundaries is a blow at the social order, which it is the *raison d'être* of every state to conserve. M. Maurice Travers, in his very full and illuminating work *Le Droit Pénal International*,[1] adopts this as the fundamental principle of all criminal jurisdiction. " Pour nous, la base unique du droit pénal est l'idée de défense ou de protection sociale." [2] Upon it he builds his whole system. Though his work contains a full and copious investigation and comparison of the practice of most civilized states, his conclusions are founded mainly upon logical reasoning from first principles and express rather what should be than what is. Their point of view is more that of a theorist than an international lawyer and they cannot therefore be treated as necessarily in harmony with the existing state of the law of nations, though eminently worthy of close attention in any study of the subject. He distinguishes the various grounds which support the assumption of criminal jurisdiction in different legal systems as follows : [3]

(1) Du lieu de l'infraction (the Territorial Theory).
(2) De la nature du fait incriminé.
(3) De la nationalité de la partie lésée (Passive National Theory).
(4) De la nationalité de la partie accusée (Active National Theory).
(5) De la présence de l'auteur du fait sur le sol de l'état qui a édicté la loi pénale (the Universal Theory).

It is unnecessary to say more of the first ground. It is clearly justified by the principle which is postulated as the fundamental one. It is the only ground of jurisdiction over

[1] In six volumes, published in 1920–4.
[2] Travers, *l. c.*, p. 10.
[3] *Ibid.*, p. 73.

aliens recognized by at least four members of the family of nations and by many writers of authority.

The second is the ground upon which jurisdiction is claimed by such a large number of states to punish " crimes portant atteinte à la sûreté ou au crédit de l'État consommés par des étrangers à l'étranger." [1]

Such crimes are treated in all their codes in an exceptional and peculiar way. So general is the practice that it might be well argued that it had achieved recognition in international law as an exception to the general rule of strict territoriality. Thus Wharton, an American writer, said in 1885,[2] " There is no civilized state that has not passed statutes making it a criminal offence for foreigners even in their own countries to forge its securities "—a statement which, though inaccurate, is strong evidence of his view of the legality of the jurisdiction claimed. A serious difficulty in the way of accepting the jurisdiction in this form as an exception recognized by the law of nations is evident upon an examination of the various codes. The type and number of acts made criminal under these headings is so various. Conspiracies against the life of the head of the state, revolutions fomented against the constitution, the circulation of forged currency notes through the post, are simple instances, not open to dispute. But a state is the judge of what endangers its security or credit. It may choose to think that opium or gambling or atheistic literature is a menace to its safety, or speculation in its currency to its credit. The question at once occurs to the mind whether the objective theory of territorial jurisdiction does not render it unnecessary to treat such offences as exceptions at all. Must not all acts which menace the safety or credit of a state be acts which produce their effects, or some of them, inside the territory? If so, there is no conflict. The right to punish is indisputable. The answer is that this is so in the great number of cases and the difference between the practice of say Great Britain and France in this respect is not nearly so wide as it appears at first sight. All the most serious dangers to a state's safety or credit are covered in this way. Nevertheless, some cannot be brought within the territorial doctrine. For instance, an active smuggler of opium or prohibited literature across the border, whose activities do not cause him to cross the

[1] Austrian Criminal Code, Act 38.

[2] *Treatise on Criminal Law* (9th ed., 1885), § 284.

frontier, would render himself punishable under either view of jurisdiction: so will the forger, who introduces into England false Treasury notes. It would, however, not be possible to say that a person did so, who set up a little opium den on a ship and sold to all and sundry just outside the three-miles limit, or who distributed false Treasury notes for exchange at the Bank of Monte Carlo,[1] or who wrote or published in Switzerland atheistic or anarchistic literature for distribution by any who would buy. The mere fact that harmful effects has been experienced within its borders of which the act of the accused alien has been in some way the cause would not necessarily serve to give a State jurisdiction over him. These harmful effects must be in a legal sense the direct results of his criminal activity. It is not possible to bring within the territorial principle all the acts which might be justiciable under Acts 76 or 77, 84–5 of the French Code.[2]

In these cases, which go beyond the objective territorial theory, it seems that jurisdiction over aliens is not recognized by international law. Conflicts on such grounds are not perhaps very likely to arise, for many codes, like the French one, provide that prosecutions under such articles are only to be instituted on the initiative of the executive.

Before leaving this class of case it may be well to note that piracy on the high seas comes within the category of crimes over which jurisdiction is recognized on account of the nature of the act itself.

The third ground in M. Travers' classification—the injury to a national—is adopted, as we have seen, in the Mexican, Brazilian, Greek, Russian, Norwegian, Swedish, and Italian codes. It is supported by the argument that a state has the right to protect its citizens abroad, and that, if the territorial state has neglected or been unable to punish persons who have injured

[1] The French code only makes the offence justiciable if the forged money is circulated in France.

[2] The general principles are found in Arts. 5 and 7 of the Code d'instruction criminelle française. The crimes included under the heading "sûreté de l'état" are defined in Arts 76, 77, 83–5 of the Criminal Code. They are summarized by Travers, *l. c.*, p. 519, and include: (*a*) intrigues with foreign powers to induce them to engage in hostilities with France. (*b*) Plots and intrigues directed towards facilitating the entry of enemies into French territory and assistance to the enemies of France. (*c*) Acts which expose France to a declaration of war or French citizens to reprisals. Acts done by a belligerent and in accordance with the laws of war are excepted but (as Travers points out) there is no limitation to be found in the code excepting acts within any of these categories if these are connected with functions conferred by a foreign government or which are permissible by international law.

them, then the national state has the right to do so if the criminals put themselves in its power. There are many theoretical objections to such jurisdiction. In the first place, the social order of their national state is not disturbed by crimes committed upon them, which produce no effect within its boundaries. Secondly, the man who, on his own business, enters a foreign country places himself under the protection of the foreign state, of whose community he temporarily forms a part, and on that protection he must rely, subject always to his national state's right to insist that legal machinery of moderate efficiency shall be exercised impartially on his behalf. If the criminal escapes to his national territory, extradition can remove him to the place whose social order his crime has infringed and by whose laws he ought to be tried. It must be admitted that this claim to jurisdiction has not received international sanction.[1]

The fourth ground is, as we have said, no concern of international law.

The fifth ground is adopted in the codes of Austria, Hungary, Italy, and the Argentine. In each of their codes this jurisdiction appears as essentially a supplementary one. The prior right of the territorial state is recognized. Extradition must have been offered and refused. In Hungary it is also discretionary. Hall says [2] that the refusal of such an offer is equivalent to a consent to the exercise of the jurisdiction, which does not afterwards take the form of jurisdiction as of right. The state who refuses the offer, however, may not be the offender's national state who will be the person to object to it. It is sometimes attempted to justify this jurisdiction on the principle of self-protection on the ground that the presence of the unpunished criminal is itself a menace to the social order. If that is so, expulsion should be an adequate remedy.[3]

The motives which underlie these provisions are undoubtedly high and idealistic, and no doubt the strictly subordinate position

[1] There is no doubt that the existing French system does not adopt this ground of jurisdiction, and for this reason efforts, which were made to punish Germans for the ill-treatment of French prisoners in Germany, were rejected by the French courts, rightly, as M. Travers says, though he would recommend the introduction of legislation rendering offences against certain classes of French citizens, who are abroad on their country's business, punishable by French tribunals (*l. c.*, p. 97).

[2] *International Law* (8th edition), § 62, p. 262.

[3] M. Travers argues that it is not (*l. c.*, p. 112) where the victim was a national.

into which this jurisdiction is placed will prevent it from becoming the source of frequent international conflict. If general assent is necessary for the exercise of criminal jurisdiction over aliens, it can hardly be said as yet to be justified by international law.

If the foundation of criminal jurisdiction is the defence of a state's social order, then it seems to follow that, if the case falls within its jurisdiction at all, it is not necessary for its court to inquire if the offence was penal by the laws of the place, where the offender was at the moment of his criminal activity. A state's own criminal laws are the expression of its own views as to what endangers its social order, and other nations' conceptions of the laws necessary to protect themselves are irrelevant, though it has sometimes been thought necessary to consider them.[1]

This seems to be a mistaken view. On the same reasoning, where there is concurrent jurisdiction, a foreign judgment, conviction or acquittal, might seem equally irrelevant. Nevertheless, a judgment of a foreign court of competent jurisdiction is, apparently, universally respected as a final conclusion of the matter by a rule of international comity, if not of law.[2]

There is one other point, which was contested in the case of the Costa Rica Packet, worth consideration before leaving this subject. Does a state exercise jurisdiction over foreigners at its peril ?

Carpenter was arrested and imprisoned for some weeks pending trial on the ground that he had committed an offence inside Dutch national waters. It was proved that the offence, if any had been committed, must have been perpetrated on the High Seas. He was released. The decision of the distinguished international jurist, who was arbitrator, does not decide this point, for he held that the Dutch courts had in fact no reasonable ground for detaining him at all,[3] i. e. that their conduct had

[1] See the judgment of Wright J. in *R.* v. *Ellis* [1899], 1 K.B. 230.

[2] M. Travers rejects this principle (*l. c.*, p. 37).

[3] *The Costa Rica Packet Arbitration* (British and Foreign State Papers, Vol. 87, p. 21, and 89, p. 1181 *et seq.*). Carpenter, a British subject, in command of an Australian ship on a whaling cruise, on January 24, 1888, when thirty-two miles from land north of the Dutch Island of Beroe (distance challenged unsuccessfully by Holland in the arbitration), sighted a derelict prau (native boat) and took off some cases of brandy, gin, and oil. On February 18, the vessel entered a Dutch port of Batjan (alleged by Holland and disputed by Great Britain that Carpenter sold the spirits there). In November 1891 the ship was in the Dutch port of Ternate. Carpenter went on shore and was arrested and imprisoned from the 2nd to the 28th on the charge of having misappropriated the contents of the prau. He was released upon a motion to the

fallen below the standard of efficiency or impartiality required by the law of nations and on that ground he condemned Holland to pay compensation. One would be tempted in the absence of authority to hazard as the answer that, if the court assumes jurisdiction upon a reasonable mistake as to the facts on which its jurisdiction rests, no international delinquency is committed. If it proceeds upon an error of law (and this means international law) a case for compensation arises.

court on the instance of the magistrate of Macassar on the ground that the evidence showed that at the time the goods were taken he was more than three miles from Boeroe. The Dutch contended before the arbitrator that the prau and cases were the property of a Dutch subject and that their courts had jurisdiction on the grounds (1) that the prau was a Dutch ship and the offence was committed there. The arbitrator Prof. de Martens of St. Petersburg rejected this, holding that the prau had not been identified; (2) that the offence was committed where the cases were sold, i. e. at Batjan. It was held that the Dutch Government was estopped from taking this point because this had not been part of the charge and the decision of their own court was against them; (3) that proceedings had been taken regularly in accordance with Dutch law and the judicial authorities acting reasonably and honestly had considered that there was sufficient evidence of the offence having been committed in Dutch waters to justify his detention pending investigation or trial. Prof. de Martens in his award said (p. 1285) "que tous les documents et actes produits prouvent le manque *de cause sérieuse pour l'arrestation* de Sieur Carpenter et confirment le droit de celui-ci à une indemnité pour les dommages qu'il a souffert."

WANTED !

AN INTERNATIONAL COURT OF PIEPOWDER

By SIR CECIL J. B. HURST, K.C.B., K.C.

THE courts of piepowder were the courts which exercised jurisdiction over all cases and disputes arising in the fairs and markets in England. They were the lowest and at the same time the most expeditious of the courts of justice known to the law of England. The name "piepowder" is a corruption of "pied poudré" and whether it signifies, as Coke explains, that justice was administered with such speed that there was no time for the suitors to brush the dust from their feet, or whether the court was so named because it was instituted to deal with the complaints of wayfarers and chapmen with dusty feet who wandered from mart to mart, matters little. These courts afford in many ways an example which governments in modern times would do well to follow, for they grew up because they were wanted and the conditions which called them into being are reproduced to some extent in international relations to-day.

The chief characteristic of the courts of piepowder was the celerity with which their work was dispatched. The business at fairs was done by travelling merchants who came to-day and were gone to-morrow : the disputes in which they were involved must be settled while they were still at the fair. "Personas qui celerem habere debent justitiam sicut sunt mercatores quibus exhibetur justitia pipoudrous," says Bracton.

The predominant characteristic of the courts of piepowder was the absence of delay. To a humble member of the community justice delayed is justice denied, and this is as true of international justice as of national. What use is it to a foreigner who is ill-treated or suffers injustice at the hands of a government if years elapse before he can get compensation ? In present circumstances, even though his case is a good one and compensation is paid in the end, he may have been ruined by the occurrence out of which the claim arose. Even if not ruined, he may have had to devote weary months of time to, and spend

sums that he could ill afford on, the prosecution of his claim. Small wonder that in many cases by the time a claim reaches a claims commission the original claimant may have been forced to part with some or all of his interest to a speculative lawyer, who buys it in order to see what can be made out of it.

The injury to the claimant is the most striking and obvious of the evil consequences resulting from delay in the settlement of international claims on behalf of individuals, but long delay is really quite as detrimental to the interests of the respondent government. It is not difficult to see why such delay takes place. No government receives with equanimity notice of a claim which is based upon an allegation of its own wrongdoing. The natural tendency when such a claim is received is to repudiate it. The respondent state cannot be compelled to submit the claim to arbitration, and it is only persistence on the part of the claimant government which may in the end lead to the respondent government agreeing to such submission. Too often does the respondent government then find to its complete discomfiture that it would have been better to spend the years which it has devoted to arguing about the worthlessness of the claim in collecting evidence to rebut it. By the time the claim comes before the tribunal, the men on whose evidence the respondent government would like to rely to disprove it are dead or scattered. There may be no means of countering the proofs put forward on behalf of the claimant, and the respondent government may be condemned to pay compensation in respect of a claim which might easily have been defeated if it had come before a tribunal when the events out of which it arose were of recent occurrence.

The very antiquity of a claim tends sometimes to give it a semblance of validity which is wholly undeserved. When criticism of the most destructive character at the hands of the respondent government fails to secure the abandonment of a claim, and at intervals it is again put forward through the diplomatic channel, a feeling tends to arise that after all the claim may possess some merits. When at length the very importunity with which the claim has been urged secures for it submission to some arbitration tribunal, the respondent government has to meet the prejudice which can be raised by dilating on the difficulty in securing an impartial hearing for the claim.

What gain then is it to either side that claims put forward by a government on behalf of its nationals should so often have

to suffer interminable delay before they can be brought to adjudication ?

The records of almost any claims commission will serve to show how great that delay is.

Take as a specimen the volume [1] edited by Mr. Ralston and published by the United States Congress in 1904, containing the record of the claims commission set up at Caracas in 1903 after the blockade of Venezuela by Great Britain, Germany, and Italy, to deal with the various claims against the Venezuelan Government.

The volume contains the text of the decisions rendered in about 130 cases. In twelve of these the judgment does not enable one to fix the date of the incident out of which the claims arose. The remaining 118 were divided as follows : Thirty-eight claims were of recent origin, i.e. less than three years had elapsed since they had arisen, and thirty-five arose out of events which had happened between three and five years before. Nine arose out of facts between six and ten years before, thirteen out of facts between ten and fifteen years before, five out of facts between sixteen and twenty years before, one between twenty and twenty-five years before, one between twenty-six and thirty years, eleven between thirty-one and forty years, two between forty-one and fifty years, one between fifty-one and sixty years, and two out of events more than seventy years before. In thirty-eight per cent. of the claims, therefore, the individuals who had suffered damage had been kept waiting for more than five years before their claims were brought to judgment.

This compares rather favourably with the record of most claims commissions. It is certainly a better showing than that of the claims commission which is now engaged in deciding the outstanding pecuniary claims between Great Britain and the United States of America under the Convention of 1910.

This latter commission has up till now decided thirty-four claims. Of these only three were less than ten years old by the time the tribunal gave its decision, the age of the claim being reckoned for this purpose from the occurrence out of which it arose. Of these three one was seven years old, another was eight, and the third was only just under ten. Of the remaining thirty-one claims, the age of twelve claims was between eleven

[1] *Venezuelan Arbitrations of 1903.* Ralston and Doyle ; Washington, 1904. Senate Document 316. 58th Congress, 2nd Session.

years and twenty ; of eleven claims between twenty years and thirty, of three between thirty and forty, of four between forty and fifty, and one was over a hundred, having arisen in 1812 and been decided in 1914.

It is much the same with the claims which are still awaiting decision. One claim arose in 1812 ; another in 1845. A group of thirteen claims, for a refund of customs duties, arose in 1876 ; another group in 1895 ; another group in 1898. With the exception of a group of claims against the Newfoundland Government on behalf of American fishing vessels for refund of customs and light dues and for seizure of vessels for violation of Newfoundland fishing statutes, it is difficult to find a single claim still awaiting adjudication which is not earlier in origin than the present century.

Another circumstance must be borne in mind. Payment of an amount due under an award of an international claims commission does not as a rule take place as soon as the decision is pronounced. It is usual to wait until the work of the commission is completed, and a lump-sum payment is then made by the respondent government ; or if there are claims put forward by both governments a balance is struck between them when the work is finished, and one government hands to the other a sum representing the difference between the awards against it and the awards in its favour. Each government then settles with its own nationals.

Under the Anglo-American claims arbitration now in progress, awards pronounced in 1913 still remain unpaid because the Convention provides for a " final award " to be made as soon as all the claims have been disposed of.

The delay in settling claims put forward on behalf of foreign nationals clearly works great hardship on the individual sufferers. As often as not they are small men who may have been almost ruined by the incident out of which the claim arose. If in addition to the hardship caused to the victim there is good ground for thinking that the interests of the respondent state also suffer, there can be no good reason for maintaining the system. How is a remedy to be found ?

What is wanted is the introduction between states of a statute of limitations ; some rule of prescription which shall bar the presentation of stale claims. Unfortunately the necessary corollary of a statute of limitations is the existence of some jurisdiction before which the claimant can bring his claim as of

right. Governments hesitate to commit themselves to any general acceptance of the principle of compulsory arbitration even for the minor questions involved in pecuniary claims. The inclusion of provisions accepting the compulsory jurisdiction of some tribunal for disputes as to the interpretation or the application of a particular instrument is becoming increasingly frequent, but something more is wanted to cover the class of pecuniary claims which come before claims commissions. Such claims are multifarious in their origin. It is not out of the application or interpretation of treaties that they arise as a rule. It is usually out of acts of officials which involve interference with the liberty of the individual or interference with land or the taking of property, and the introduction of a rule that claims of this kind are to be barred after the lapse of a certain period of time would necessarily involve the acceptance by governments of the compulsory jurisdiction of some tribunal for their adjudication.

One of the categories of disputes enumerated in Article 13 of the Covenant of the League of Nations as being generally suitable for submission to arbitration covers most of the pecuniary claims which come before claims commissions :

> " Disputes as to the existence of any fact which if established would constitute a breach of any international obligation or as to the extent and nature of the reparation to be made for any such breach."

But the obligation undertaken by the Members of the League in Article 13 is not absolute. It is only the adoption of a pious resolution, a declaration that such disputes are generally suitable for submission to arbitration. Until states are prepared to accept a binding obligation to submit claims to arbitration on demand, it clearly would be unjust to penalize the claimant by barring the claim after a certain lapse of time merely because he has been unable to get it settled. So long as the respondent state is under no obligation to let the claim go to arbitration, it must be content that when it consents to the establishment of a claims commission claims of an antiquated nature may be brought up.

Similarly it must also be content that its own nationals who have claims against some foreign government should endure the hardships involved in the delay in getting their claims settled under the present system.

Whether it may be possible to find some remedy which shall be free from the objections entertained so strongly in many

quarters to any general acceptance of the idea of compulsory arbitration is rather beyond the scope of this paper. If a remedy could be found it would be a great advantage to the luckless individual who suffers from the delay. It would also benefit the governments against whom claims are preferred, because they would no longer have to defend themselves against stale claims in which, if an adverse award is made, it may involve the payment of interest over a long series of years as well as the amount awarded in respect of the claim.

Agreement was very nearly reached on this subject in 1907 at the Second Peace Conference at The Hague. The committee of the conference which dealt with the subject of compulsory arbitration prepared a scheme by which the contracting states agreed that disputes of a legal nature or relating to the interpretation of treaties should be submitted to arbitration unless the state concerned considered that the dispute involved its vital interests, independence or honour, but also bound themselves in certain cases not to raise the plea of vital interests, &c. Among these cases figured "Pecuniary claims on account of injuries when the principle of indemnity is recognized by the parties."

Pecuniary claims of the type with which claims commissions deal do not raise political issues which might disturb the good relations between states; still less do they involve the vital interests, independence, or honour of the states concerned. Almost always they arise out of some alleged official action or blunder, often trifling in character, where speedy justice is all that is required, and where an opportunity for submission to a court in which both sides will be heard and the facts elucidated when they are still fresh and evidence can be obtained will give a *quietus* to many of them.

Like the courts of piepowder a jurisdiction to deal with pecuniary claims of this kind should be simple and expeditious.

Elaborate printed cases and countercases, memorials and answers, followed by prolonged oral arguments may be necessary in international arbitrations involving issues of political importance. They are out of place in deciding simple questions such as whether damage done to foreign property during a native rising might have been prevented by the local authorities, or whether a particular fishing vessel was arrested within or without the limits of territorial waters.

The smaller the tribunal and the simpler its procedure, the more easily it can be convoked and the more expeditiously it can decide the cases which are brought before it.

International litigation must necessarily be conducted in the name of the governments of the states concerned and under the control of agents who represent them, but there is no reason why the individuals concerned should not provide for the conduct of their cases before the tribunal if this is done subject to the general control of the government representative. If the machinery is made too cumbrous and expensive this becomes impossible, and the conduct of the case must then either be left to the government concerned and the expense borne by the taxpayer, or the case must be abandoned.

Like the wayfarers and petty chapmen for whose benefit the courts of piepowder existed, the claimants in the cases which should come before international claims commissions are often men of humble position and small means, and for them international justice, as much as national justice, should be speedy, effective, and cheap.

THE OBLIGATORY JURISDICTION OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE

By PROFESSOR P. J. BAKER, M.A.,

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I

THE purpose of this article is to consider some aspects of the proposal that Great Britain should accept the obligatory jurisdiction of the Permanent Court of International Justice in international disputes of a legal nature, by making the optional declaration for which Article 36 of the Statute of the Court provides.

Article 36 runs as follows :

" The Members of the League of Nations . . . may . . . declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other Member or state accepting the same obligation, the jurisdiction of the Court in all or any of the classes of legal disputes concerning :

(*a*) The interpretation of a Treaty ;

(*b*) Any question of International Law ;

(*c*) The existence of any fact, which if established, would constitute a breach of an international obligation ;

(*d*) The nature or extent of the reparation to be made for the breach of an international obligation. . . .

In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court."

The declaration for which this article provides has already been made by the governments of twenty-one Members of the League, including the Government of France, and most of them have given their declaration binding force either by formal ratification or in some other way. In addition the obligatory jurisdiction of the Court in legal disputes has been accepted in principle by ten other governments who, by signing the Geneva Protocol, have provisionally engaged themselves to make the declaration in question within one month of the date on which that Protocol comes into force.

The terms of the Geneva Protocol have brought the question of the obligatory jurisdiction of the Permanent Court before the British Government in a practical form. But the question of the obligatory jurisdiction of the Permanent Court is one which it is

well to consider on its own merits, for it has no necessary connexion with the general policy of the British Government in respect of the Protocol.

The first draft of the Statute of the Permanent Court of International Justice was prepared by a special committee of eminent jurists, appointed for the purpose by the Council of the League in 1920. In the proposals which these jurists laid before the Council of the League they provided that the Permanent Court should have obligatory jurisdiction in all disputes which fell within the categories defined in Article 36 as quoted above. The actual clause was as follows :

" Between states which are Members of the League of Nations the Court shall have jurisdiction (and this without any special Convention giving it jurisdiction) to hear and determine cases of a legal nature concerning :

(*a*) The interpretation of a Treaty . . ." (as above).[1]

This clause was omitted by the Council from the draft which they laid before the First Assembly, and in its place they put the following alternative :

" Article 33. The jurisdiction of the Court, as defined by Articles 12, 13, and 14 of the Covenant.

" Article 34. Without prejudice to the right of the parties according to Article 12 of the Covenant to submit disputes between them either to judicial settlement or arbitration or to enquiry by the Council, the Court shall have jurisdiction (and this without any special agreement giving it jurisdiction) to hear and determine disputes, the settlement of which is by treaties in force entrusted to it or to the tribunal instituted by the League of Nations." [2]

These proposals, however, the First Assembly in their turn rejected and for them substituted the new Article 36 (quoted above), which became a definitive part of the Statute of the Permanent Court.

Lord Balfour, the representative of Great Britain, took the lead in securing the rejection of the obligatory jurisdiction proposed by the Committee of Jurists. His reasons for this attitude are well stated in the following note which he communicated to the Council on behalf of the British Cabinet :

" The first observation I have to make is that the scheme (i. e. the scheme presented by the jurists) with all its methods goes considerably beyond the Covenant. Article 14 (of the Covenant) . . . clearly contemplates . . .

(*a*) that the Court has only to deal with disputes which are voluntarily submitted to it by the authorities concerned, and

[1] Report of the Jurists' Committee : Assembly Document, No. 44, 1920 (20/48/44), p. 49.

[2] *Ibid.*, p. 87.

(*b*) that it has to give an advisory opinion on any dispute or question which the Council or Assembly may choose to submit to it.

"*Evidently the framers of the articles* (12, 13, and 14 of the Covenant) *never intended that one party to the dispute should compel another party to go before the tribunal ;* and this omission cannot have been a matter of choice since the subject of *compulsory arbitration has been before the legal authorities of the whole world now for many years.* It has more than once been brought up for practical decision, and *has always been rejected.*"

In what follows an attempt is made to examine Lord Balfour's two contentions ; that is to say, to inquire :

First : In what sense and how far the proposals of the Jurists' Committee for the compulsory jurisdiction of the Permanent Court went beyond the intention of the framers of the Covenant :

Second : Is the issue which has now to be decided, either in connexion with Article 3 of the Protocol or on its own merits, identical with the issue of compulsory arbitration which has "been before the legal authorities of the whole world now for many years," and which "when brought up for practical decision . . . has always been rejected" ? In other words, do the objections which before the war were brought against proposals for universal compulsory arbitration apply with equal force to the present proposal to give obligatory jurisdiction in justiciable disputes to the Permanent Court ?

II

The two contentions may be dealt with in turn. First, was Lord Balfour right in saying that by their proposal to give obligatory jurisdiction in all justiciable disputes to the Permanent Court the Jurists' Committee went beyond the intention of the authors of the Covenant ? If so, in what sense did they do so ? Was the proposal definitely inconsistent with the principles of the Covenant ?

It has occasionally been disputed by eminent lawyers that the proposal of the jurists went in any way beyond what the Covenant had already provided. This view was put forward with much cogent reasoning in the *British Year Book of International Law* for 1921 by Dr. B. C. J. Loder, who was a member of the Jurists' Committee and who has since been President of the Permanent Court. There is no need, however, to deal in detail with his contention. Though it was ingenious and learned, it was founded on the assumption that in Articles 12–14 of the Covenant

as adopted in 1919, the word "arbitration" was used in an exact technical sense to mean nothing but recourse to an *ad hoc* tribunal of arbitrators agreed upon either *pro hac vice* or in advance by the parties to a dispute, the proceedings of which would be identical with those of the arbitration tribunals of the pre-League period. In fact this assumption was unfounded. Those who were familiar with the proceedings of the League of Nations Commission of the Peace Conference at Paris know that the word "arbitration" was used throughout those proceedings in a double and ambiguous sense.[1] It was used to mean both arbitration in this strict technical sense which Dr. Loder gave it, and also to mean recourse to judicial settlement. The fact that no clear distinction between these two meanings was made was due to the determined "anti-legalism" of President Wilson. The whole of Articles 12–14 were indeed a compromise produced by a conflict of opinion between President Wilson, who was against elaborating the existing legal development of the society of states, and Lord Robert Cecil, who saw in that development one of the most helpful means of ensuring the pacific settlement of international disputes. Lord Robert Cecil secured in substance most of what he wanted, but in form he had to compromise, and in consequence the word "arbitration" remained with the double and ambiguous sense which has been described. This ambiguity not unnaturally misled Dr. Loder, as it misled other lawyers, concerning the interpretation of these provisions of the Covenant. It was removed by the amendments agreed to by the Second Assembly, which in 1924 at length came into force, and which substituted for the word "arbitration" the words "arbitration or judicial settlement". This change, which faithfully interprets the intentions of the authors of the Covenant, removes the foundation upon which Dr. Loder's arguments repose. It also makes it plain that the only possible interpretation of the Covenant is one which leaves to the Members of the League an ultimate right to reject the jurisdiction of the Court even in a legal dispute if they think it necessary to do so.

Indeed, the Committee of Jurists themselves admitted that such was the intention of the Covenant. They admitted that, in Lord Balfour's words, "the framers of the articles never intended that one party to a dispute should *compel* another party to go

[1] Cf. *History of the Peace Conference*, Vol. VI, p. 491 *et seq.*; *Les origines et l'œuvre de la Société des Nations* (Munch), Vol. II, p. 48 *et seq.*

before the Court"; that, if it wished to exercise it, each Member of the League had the ultimate right to refuse judicial settlement even for the most justiciable of disputes. Their proposal for obligatory jurisdiction, therefore, was not put forward as a *necessary* consequence of the Covenant, but simply as a development of the Covenant which the Members of the League were quite at liberty to make, if they desired to do so, by a new and voluntary contractual obligation.

They argued that since, under Article 14, the Permanent Court is competent "to hear and determine any dispute of an international character which the parties thereto submit to it," and since states may, by a general treaty, agree in advance to submit all their legal disputes to the Court, it was plainly within the power of Members of the League to make this agreement in the Statute of the Court, and plainly consistent with the Covenant that they should do so. Their proposal simply was that the Statute should contain a new general contractual obligation for this purpose. But they also went further and said that such a new contractual obligation, although not a necessary consequence of the Covenant, would be not merely a permissible, but also a logical development of its system. Their argument appears in that passage of their Report which relates to the draft article 34 quoted above:

"The granting of such powers (to the Court) though perhaps not strictly in accordance with the letter of the Covenant follows its spirit so exactly that it would seem a great pity now that the Court is being definitely organized, not to complete the progress made by this last provision (Article 13). . . . Not only is such a reform within the powers of the states creating the Court but it is implied in Article 13 of the Covenant. It follows from that article that there are cases in which states are bound to submit to arbitration:

"The Members of the League agree that, whenever any dispute shall arise between them which they recognize to be suitable for submission to arbitration or judicial settlement and which cannot be satisfactorily settled by diplomacy, they will submit the whole subject-matter to arbitration. Disputes as to the interpretation of a treaty, as to any question of International Law, as to the existence of any fact which, if established, would constitute a breach of any international obligation, or as to the extent and nature of the reparation to be made for any such breach, are declared to be among those which are generally suitable for submission to arbitration."

"The words 'in their opinion' seem to weaken these provisions, but the good faith of states concerned must be assumed. The word 'general' still further diminishes the force of the expression, but nevertheless the fact remains that according to the terms of Article 13 the states have agreed to submit to compulsory arbitration in a certain number of cases."

In other words the jurists held that there is an assumption in the Covenant that all justiciable disputes will be settled by judicial process, and that states which resist judicial process in such disputes must show cause why this assumption does not hold good. This is plainly a reasonable, and indeed the only feasible interpretation of the paragraphs of Article 13 which have been quoted. In these paragraphs the Members of the League solemnly agree that they will submit to judicial settlement disputes which they recognize to be suitable for that procedure; they proceed to "declare" (a strong word in international documents) that the classes of disputes mentioned in the second paragraph are "generally" suitable. The word "generally" taken with its context can only mean "failing proof to the contrary," since, as the jurists say, the good faith of the parties must be assumed. The result is that in the intention of the authors of the Covenant the Council should only deal with justiciable disputes when they are complicated by political considerations of overwhelming importance. This, moreover, is in accord with the intention of Article 15 of the Covenant, under which the Council has to follow a procedure evidently intended for disputes which are not suitable for arbitration or judicial processes.

If this interpretation be accepted, the result is important, since it makes the proposal for the acceptance of the obligatory jurisdiction of the Permanent Court less of a break with the system of the Covenant than the uncompromising phrases of Lord Balfour's note would at first sight make it appear. This indeed was recognized by the Council of the League, who in making their decision on Lord Balfour's contentions accepted a report in which there occurs the following passage:

"The innovation involved in The Hague scheme (i.e. the jurists' proposals) may be summed up as follows:

"... A decision of the Permanent Court is substituted for the free choice allowed to the parties by the Covenant with regard to the question whether they shall lay their dispute before the Court, before another international tribunal or before the Council of the League of Nations." [1]

And the Report goes on to say that:

"The Council does not in any way wish to declare itself opposed to the actual idea of the compulsory jurisdiction of the Court in questions of a judicial nature. This is a development of the authority of the Court of Justice which may be extremely useful in effecting the general settlement of disputes between

[1] Assembly Document, No. 44, 1920, p. 87.

nations, and the Council would certainly have no objection to the consideration of the problem at some future date." [1]

In other words the opposition of the Council to the proposal of the jurists was based, not upon the contention that it would be in disagreement with the spirit of the Covenant, but on grounds of caution.

A second point of equal importance is that the Council did not reject the doctrine of the jurists that there is an assumption in the Covenant that justiciable disputes will be dealt with by judicial process. That doctrine remains, therefore, of real theoretical importance.

And its theoretical importance has been greatly increased by subsequent experience of the working of the institutions of the League. In practice what happens is as follows : If any party to a dispute refuses submission to the Permanent Court in a case which its opponent declares to be justiciable—and this has actually happened in variously disguised ways on a number of occasions [2]—the case then goes in the first instance before the Council of the League. In the Council the party which claims that the dispute is justiciable and that it should be settled by the application of existing legal rights, puts forward the legal grounds for these contentions and urges that the Council should exercise its power under the last sentence of Article 14 of the Covenant to ask for an advisory opinion of the Permanent Court upon them. Experience has shown that in practice such a claim can hardly be resisted by the other party, provided there is good ground for holding that there are *bona fide* legal points involved in the dispute. Even if the opposing party ventures to resist such a contention—resistance has been attempted in a half-hearted manner by Poland in one or two of the disputes in which she has been involved [3]—the Council will almost certainly overrule it and adopt the proposal to request an advisory opinion from the Permanent Court. For evidently it is for the Council much the easiest way out of the rather difficult position in which every acute international dispute must place them. In fact they have *always* complied with such requests up to the present time without the least hesitation, and by a unanimous vote.

[1] Assembly Document, No. 44, 1920, p. 87.

[2] e. g. Aaland Islands dispute ; Anglo-French dispute concerning nationality in Tunis ; Javorzina boundary dispute, &c.

[3] e. g. Javorzina dispute.

Nor need the Council even be unanimous. Even if there were some Members who doubted whether it would be right to ask for an advisory opinion, neither their doubts nor their active opposition would prevent a request for an advisory opinion, for such a request can be made as a matter of procedure and by majority vote. This indeed is sometimes disputed. It is said, for example, that a request for the opinion of the Court involves a substantive decision which must, under the general rule of Article 4 of the Covenant, be taken by unanimity. It is also said that a right so to act by majority would contravene the right of every Member of the League under Articles 12 and 13 to refuse in the last resort to submit its disputes to the Permanent Court. This last argument implies the conclusion that the Council could not ask for an advisory opinion of the Court without the consent of the parties to the dispute, which few would be willing to admit. But in any case the contention that an advisory opinion can only be asked for by unanimity appears to miss the essential legal difference between a judicial verdict by the Court and an advisory opinion. A request for an advisory opinion does not involve the complete transference of the whole dispute to the Permanent Court, nor does it bind any one to accept the result to which the consultation of the Court may lead. The Council merely asks for advice on certain specific and carefully formulated points. This advice binds neither the Council itself nor *a fortiori* the parties. No one denies that the Council under Article 15 has the right to secure advice from qualified experts on any aspect of a dispute with which it may have to deal. It can take advice from economic experts on economic points, or advice from political experts on points of policy. It has often done so by appointing special commissions of experts to inquire into different aspects of disputes, and every one admits that such inquiries may be decided upon by majority vote. Similarly, it may surely be held that the Council is entitled to take legal advice on legal points involved in disputes and to take the best that is available, that is to say the advice of the Permanent Court ; and just as it can seek advice on other points as a matter of procedure and by majority vote, so can it on questions of law.

To be sure, an advisory opinion of the Court, as has been said, is not a binding verdict. But in practice the Council have shown no disposition to reject any opinion that the Permanent Court may give. On the contrary, they have in every case confined

their subsequent efforts to securing the most satisfactory application of the legal rights which the Permanent Court in their opinions have declared to exist. There can be no doubt that this will always be their attitude; and that the parties, though they will still have, under the Covenant, the formal right to reject the conclusions which the Council by this method may reach, will hesitate long before they do so.

In short, in a good deal of practice,[1] no state has ever yet seriously resisted a proposal that the Council should request an advisory opinion from the Court on any matter which could fairly be claimed to be justiciable; the Council has never hesitated to act on any well-founded proposal of this sort; neither the Council nor any party has hesitated to accept the results to which such a proposal led. Is it not, therefore, possible to argue with good show of reason that in consequence of this practice a quasi-obligation to send all legal questions to the Court for settlement is growing up, and that even if nothing more were done, the progress of the present process would in a relatively short time create a customary but binding obligation to allow the settlement of all legal questions by judicial process ?

It may therefore be concluded that, while Lord Balfour was accurate in saying that the proposal of the jurists to confer obligatory jurisdiction on the Court in justiciable disputes went beyond the letter of the Covenant, that proposal was in no sense contrary to the principles upon which the Covenant was built. On the contrary, once the Covenant was accepted, the acceptance of the obligatory jurisdiction of the Court was no longer a matter of principle so much as a matter of time and opportunity. Further, the importance of this theoretical view is increased by the practice of the last five years, since this practice has shown that the obligatory jurisdiction of the Court on justiciable questions is so much in accordance with the spirit of the Covenant that the normal working of the provisions of that document is building up a virtual obligation which is still, no doubt, merely moral and political, but which would in due course become legally binding on the Members of the League.

[1] Apart from the legal advice taken concerning the Aaland Islands dispute in 1920, the Council has asked the Permanent Court for advisory opinions on thirteen occasions up to March 20, 1925.

III

There remains the second of Lord Balfour's contentions, that it *must* have been beyond the intention of the framers of the Covenant to confer obligatory jurisdiction on the Permanent Court, " since the subject of compulsory arbitration has been before the legal authorities of the whole world now for many years. It has more than once been brought up for practical decision and has always been rejected."

The argument so far put forward will, if it be accepted, give an *a priori* answer to this contention also. But an *a priori* answer is not enough ; it is necessary also to examine the development of international arbitration before the war ; the proposals then made for compulsory arbitration ; the objections brought against these proposals ; why these objections led to the result that whenever " brought up for practical decision," compulsory arbitration was " always rejected " ; finally, to what extent these objections are applicable to the proposal to accept in present-day conditions the obligatory jurisdiction of the Permanent Court.

1. The first point for discussion is whether compulsory arbitration of the kind proposed before the war is in any way comparable in nature to the obligatory jurisdiction which a number of states have already given to the Permanent Court. Arbitration, of course, is a very old international institution ; almost from time immemorial statesmen and sovereigns have on occasion submitted a dispute to the impartial decision of an independent " arbitrator." As the international society of states developed during the nineteenth century and as the relations between its members became closer, the practice of resort to arbitration became more and more common. In the later decades of the century it led to attempts to create an organized international system for the settlement of disputes by arbitral means. In its early development it was by no means wholly a judicial process ; indeed it is true to say that it was often in great part diplomatic. This, perhaps inevitably, resulted from the fact that arbitral tribunals consisted of judges appointed by the parties to the dispute, together with a neutral president. It was natural, and sometimes not wholly undesirable, that the neutral president should resort to methods of conciliation and compromise to secure an agreed settlement of a dispute. But as the use of arbitration developed, so it became

more and more judicial and less and less diplomatic. This change was recognized as necessary and desirable by governments and international lawyers. The instructions given by President Roosevelt to the American delegates to the second Hague Conference in 1907 charged them with doing everything in their power to promote the judicial character of recourse to arbitration, and spoke of its diplomatic character as being the principal obstacle to its more extended use. The same view was put forward by one of the greatest of international lawyers, M. Louis Renault, in the following words :

" J'ose croire et affirmer que l'arbitrage international ne développera sérieusement qu'en quittant d'une manière absolue le domaine politique et diplomatique où il a été longtemps confiné pour rester pleinement dans le domaine judiciaire où il ne fait qu'entrer. C'est à cette seule condition qu'il inspirera confiance aux gouvernements et aux peuples." [1]

M. Renault's view so rapidly became a general conviction that it is safe to say that arbitration was definitely recognized before the war, both by governments and by lawyers, as a judicial process. This recognition was indeed already given in principle in the first attempt made in 1899 to organize in the first Hague Convention for the Pacific Settlement of International Disputes a general system of arbitral procedure. The whole of that Convention was founded on the conception embodied in its Article 15,[2] which is as follows :

" International arbitration has for its object the settlement of differences between States by *judges* of their own choice and *on the basis of respect for law*."

This definition was reaffirmed in Article 37 of the new version of the Convention prepared by the second Peace Conference in 1907.[3]

This view was also taken by leading British lawyers, of whom two may be quoted. Westlake speaks of arbitration as " essentially a juridical proceeding." [4] Sir F. Pollock, speaking of arbitral tribunals organized under the Hague Conventions, writes as follows :

" Before the War there was much academic discussion of the question whether The Hague tribunal is a real court of justice. . . . The tribunal dealing with each case is a judicial body and bound to act judicially. . . . No one main-

[1] Preface to *Recueil des Arbitrages Internationaux*, by Lapradelle et Politis, Vol. I, p. 10.

[2] *The Hague Peace Conferences*, Pearce Higgins, p. 121.

[3] *Ibid.*

[4] Westlake : *International Law—Peace*, p. 305.

tains that The Hague tribunal is a perfect court. To deny that it is a court of justice at all or that it has done some fairly effectual justice appears to me to be a feat of rather high dialectical courage." [1]

There was substantial agreement therefore that the system of arbitration as organized by the Hague Conventions of 1899 and 1907 was the best available substitute in the society of states for the law courts of a municipal system, and that recourse to such arbitration was to be regarded as essentially a judicial process. This being so, the objections brought against pre-war proposals for compulsory reference of disputes to arbitration on the demand of a single party will *ceteris paribus* apply equally to an obligation to submit disputes to the Permanent Court on the demand of a single party. So far at least Lord Balfour was on solid ground.

2. The extended use of the method of arbitration which led to its organization as a general system in the two Hague Conventions of 1899 and 1907 was the result of a powerful movement of opinion. Protagonists of arbitration in many countries urged its use on every possible occasion. Their fundamental proposition—that every dispute which could be settled justly by the application of existing law ought to be so settled—was difficult to resist. And its gradual acceptance led logically to the further proposition that any party ought to have the right to insist on arbitration in a dispute capable of settlement by that means. This proposition again it was evidently difficult in theory to resist. For that reason it rapidly gained ground, until it is fair to say that by 1907, when the first Hague Convention for the Pacific Settlement of International Disputes was revised, compulsory arbitration of arbitrable disputes had become *in theory* an accepted doctrine.

It had indeed received by that date a certain amount of practical recognition and even of practical application. Its general progress can perhaps best be illustrated by the following facts.

In 1874 the Universal Postal Union was established by a general Convention, Article 16 of which provided for obligatory arbitration as the means of settlement for all disputes which might arise concerning the interpretation or the application of the Convention. This was the first occasion on which compulsory arbitration was agreed to, and doubtless its acceptance was due to its great practical convenience in a technical and politically unimportant sphere of international action.

[1] *League of Nations*, second edition, pp. 59–60.

In 1890 the Pan-American Congress adopted " a Plan of Arbitration " of which Article 4 was as follows :

" The sole questions excepted from the provisions of the preceding articles " (providing for compulsory arbitration) " are those which in the judgment of any one of the nations involved in the controversy may imperil its independence, in which case for such nation arbitration shall be optional, but it shall be obligatory upon the adversary power."

This Plan was accepted by sixteen out of nineteen American Republics, including the United States, only Chile, Uruguay, and San Domingo refusing it.

In 1897 Lord Salisbury made a remarkable treaty of arbitration between Great Britain and the United States, the negotiations for which marked a turning-point in the development of the arbitration movement. In an important despatch expounding his general views about the subject Lord Salisbury explained the obstacle to arbitration which resulted from the difficulty of securing arbitrators for important international disputes who would command the confidence of the parties, and he concluded his argument by saying that this treaty would make " a substantial advance . . . ; and if, under its operation, experience should teach us that our apprehensions as to the danger of reposing an unlimited confidence in this kind of tribunal are unfounded, it will be easy, by dropping precautions that will have become unnecessary, to accept and establish the idea of arbitration in its most developed form." [1]

In 1899 Article 16 of the first Hague Convention was adopted as follows :

" In questions of a legal nature and especially in the interpretation or application of international conventions arbitration is recognized by the signatory powers as the most effective and at the same time the most equitable means of settling disputes which diplomacy has failed to settle."

This general statement, with its indication of the classes of dispute to which it was felt that arbitration *ought* to be applied, marked a considerable advance towards the acceptance of the theoretical doctrine of compulsory arbitration in disputes for which an arbitral process was suitable.

Subsequent discussions on the possibility of translating the principle of this article into practice led to a still further advance of theory at the second Hague Conference of 1907. As will be seen later, the second Conference failed in its attempts at practical

[1] Cited by Barclay : *New Methods of Settling International Disputes*, pp. 57–8.

application, but the delegations all agreed to the following declaration, which formed part of their Final Act :

" It (the Conference) is unanimous—

1. In admitting the principle of compulsory arbitration ;

2. In declaring that certain disputes, in particular those relating to the interpretation and application of the provisions of international agreements, may be submitted to compulsory arbitration *without any restriction.*"

An obligation to submit suitable international disputes to arbitration on the demand of any party was thus definitely accepted in principle as a legitimate and desirable objective.

As has been said, this represented an advance rather of doctrine than of action ; but even in practical application something had been done through the Universal Postal Convention and some other similar treaties to show that in certain spheres of international activity compulsory arbitration was a matter of practical politics.

3. The development of the *doctrine* of compulsory arbitration which has just been described was relatively a simple matter. It was when the governments tried to apply the doctrine at the Hague Conferences and in negotiations for bilateral treaties that real difficulty arose. They were willing to agree that arbitration ought to be applied to all disputes for which it was suitable. The crucial point was what disputes *were* suitable. In determining their standpoint the governments were faced with the insistent demands of the extreme advocates of compulsory arbitration that it should be applied to every kind of dispute. These advocates held that on every ground of policy and justice arbitration in all circumstances was preferable to the forcible settlement by means of war of questions to which diplomacy could give no solution, and they argued that governmental reluctance to accept this view must be due to unworthy motives.

The arbitrationists were met, however, both by the immovable resistance of the governments and by the serious theoretical objections of international lawyers. These theoretical objections will be examined later on. It may be useful first to examine the nature of the practical negotiations on the subject which took place between 1899 and 1914.

In these negotiations the following propositions came gradually to receive general acceptance, both among governments and among all competent persons.

(i) It was agreed that some classes of international disputes did not arise out of matters regulated by international law ; that

they could not therefore be settled by the application of its rules ; that they were essentially political in nature, and that for dealing with them some pacific political process other than arbitration was required. There was in fact a general recognition of the valid distinction between what are now conveniently called justiciable and non-justiciable disputes.

(ii) It was also agreed that in disputes which *did* arise out of matters regulated by the rules of international law arbitration was, in the words of the Hague Convention, " the most effective and the most equitable means of settlement," and that, therefore, it ought to be possible to agree on an absolute and binding obligation that states should submit such justiciable disputes to an arbitral process.

(iii) But it was also agreed that even in an apparently justiciable dispute great political issues might be involved, and that overriding political considerations might render an application of a legal process inadequate or inacceptable or unjust. It may be that emphasis was laid on the idea of inacceptability rather than on the idea of injustice ; in any case, the important point is that it was generally felt that even in disputes which at first sight seemed justiciable some reservation must be made.

These three propositions were first given coherent expression in the draft Convention and accompanying explanatory memoranda on the pacific settlement of international disputes laid before the Hague Conference in 1899 by the Russian Government. It may be useful to make some quotations, since the views put forward in this draft Convention and the memoranda have profoundly affected the whole subsequent legal development of the society of states.

The second of the memoranda says that all international disputes of every kind may be divided into two categories : [1]

" (1) Un État demande à un autre une indemnisation matérielle pour dommages et pertes causés à lui-même ou à ses ressortissants par des actes de l'État défendeur ou de ses ressortissants qu'il juge n'être pas conformes au droit : (2) Un État demande à un autre d'exercer ou de ne pas exercer certaines attributions déterminées du pouvoir souverain, de faire ou de ne pas faire certains actes déterminés ne touchant pas à des intérêts d'ordre matériel."

The memorandum proceeds to say that in the first of these

[1] *Correspondence respecting the Peace Conference held at The Hague in 1899* (Misc., No. 1, 1899) (C. 9534), p. 43.

categories the principle of obligatory arbitration ought to be accepted. It adds that reserves must be inserted even in this category : [1]

" Il va de soi que dans les cas exceptionnels où la question pécuniaire engagée prend un caractère d'importance de premier ordre, au point de vue des intérêts de l'État, par exemple, dans le cas où il s'agit d'une faillite d'un État, chaque Puissance, invoquant l'honneur national ou ses intérêts vitaux, aura la possibilité de décliner l'arbitrage comme moyen de solution du conflit."

It says for the second category of disputes—

" Il semble que l'arbitrage obligatoire ne pourrait et ne devrait pas leur être appliqué. C'est dans cette catégorie que rentrent les conflits de toute sorte surgissant sur le terrain des traités politiques, lesquels touchent aux intérêts vitaux et à l'honneur national des États."

It concludes by suggesting certain classes of treaties and other spheres of international relationship in respect of which obligatory arbitration subject to reserves might be accepted.

These views were embodied in the following concrete provisions of the Draft Convention put forward by the Russian Delegation: [2]

" Art. 5. Les Puissances jugent utile que, dans les cas de dissentiment grave ou de conflit entre États civilisés concernant des *questions d'intérêt politique*—indépendamment du recours que pourraient avoir les Puissances en litige aux bons offices ou à la médiation des Puissances non impliquées dans le conflit—ces dernières offrent de leur propre initiative, en tant que les circonstances s'y prêteraient, aux États en litige leurs bons offices ou leur médiation, afin d'aplanir le différend survenu, en leur proposant une solution amiable qui, sans toucher aux intérêts des autres États, serait de nature à concilier au mieux les intérêts des parties en litige."

This proposes a not very adequate but definitely political process—that of facultative mediation—for dealing with non-justiciable disputes. It is worth noting that it is based on the principle upon which Article 11 of the Covenant has since been founded.

The remainder of the Russian proposals are embodied in Articles 7 to 11 of their Draft Convention : [3]

" Art. 7. En ce qui regarde les cas de litige se rapportant à des *questions de droit*, et, en premier lieu, à *celles qui concernent l'interprétation ou l'application des Traités en vigueur*—l'arbitrage est reconnu par les Puissances Signataires comme étant le moyen le plus efficace et en même temps le plus équitable pour le règlement à l'amiable de ces litiges.

Art. 8. Les Puissances Contractantes s'engagent par conséquent à recourir à l'arbitrage dans les cas se rapportant à des questions de l'ordre mentionné

[1] *Correspondence respecting the Peace Conference held at The Hague in 1899* (Misc., No. 1, 1899) (C. 9534), p. 43.

[2] *Ibid.*, p. 20.

[3] *Ibid.*, pp. 20–21.

ci-dessus *en tant que celles-ci ne touchent ni aux intérêts vitaux, ni à l'honneur national* des parties en litige.

Art. 9. Chaque État reste seul juge de la question de savoir si tel ou tel cas doit être soumis à l'arbitrage, excepté ceux énumérés dans l'Article suivant et dans lesquels les Puissances Signataires du présent Acte considèrent l'arbitrage comme obligatoire pour elles.

Art. 10. A partir de la ratification du présent Acte par toutes les Puissances Signataires, *l'arbitrage est obligatoire* dans les cas suivants, *en tant qu'ils ne touchent ni aux intérêts vitaux, ni à l'honneur national des États Contractants* :

1. En cas de différends ou de contestations se rapportant à des dommages pécuniaires éprouvés par un État, ou ses ressortissants, à la suite d'actions illicites ou de négligence d'un autre État ou des ressortissants de ce dernier.

2. En cas de dissentiments se rapportant à l'interprétation ou l'application des Traités et Conventions ci-dessous mentionnés :

(i) Traités et Conventions postales et télégraphiques, de chemins de fer ainsi qu'ayant trait à la protection des câbles télégraphiques sous-marins ; règlements concernant les moyens destinés à prévenir les collisions de navires en pleine mer : Conventions relatives à la navigation des fleuves internationaux et canaux interocéaniques.

(ii) Conventions concernant la protection de la propriété littéraire et artistique, ainsi que la propriété industrielle (brevets d'invention, marques de fabrique ou de commerce et nom commercial) ; Conventions monétaires et métriques ; Conventions sanitaires, vétérinaires, et contre le phylloxéra.

(iii) Conventions de succession, de cartel, et d'assistance judiciaire mutuelle.

(iv) Conventions de démarcation, en tant qu'elles touchent aux questions purement techniques, et non politiques.

Art. 11. L'énumération des cas mentionnés dans l'Article ci-dessus pourra être complétée par des accords subséquents entre les Puissances Signataires du présent Acte."

It was on the doctrine embodied in these passages from the Russian memoranda and Draft Convention that all subsequent development, both of theory and practice, was based. It is necessary to note two points concerning this doctrine :

First, while there was a definite recognition of the fundamental distinction between justiciable and non-justiciable disputes, between disputes which were capable of settlement by judicial process and disputes which were not, no attempt was made either in the memoranda or in the Draft Convention to make a general definition which would cover disputes that were justiciable. It was vaguely recognized that disputes to be justiciable must be " legal " (se rapportant à des questions de droit), and it was also vaguely recognized that those which related to the interpretation or application of treaties were probably of this kind. But the border-line between justiciable and non-justiciable, between " legal " and " political," was felt to be too vague to admit of

exact definition. Therefore, instead of attempting to make a general definition, the authors of the Russian memoranda proposed the method of writing down in a detailed list the " positive content," so to speak, upon which any satisfactory definition must have been built; they tried, that is to say, to secure some of the results of a definition without making the definition itself, by drawing up a list of the kind which appears in Article 11 of their draft above. This method proved to be of importance in subsequent negotiations.

Second, there was, both in the Russian memoranda and in the Draft Convention, insistence upon the necessity of a general reservation even in respect of disputes recognized as being *prima facie* justiciable in nature. This reservation was expressed in the phrases " vital interests " and " national honour " which appear in Articles 8 and 10 of the Draft Convention. It was, of course, held by many critics that such a wide reservation virtually left in the discretion of each Power an unlimited right to decide when a dispute was or was not justiciable; but it was none the less destined to reappear in practically every arbitration treaty which was subsequently made.

From 1899 onwards many bilateral arbitration treaties were concluded, the governments acting no doubt under the stimulus of the Hague Conference and in response to the world-wide movement of opinion. These treaties increasingly reflected the desire to introduce a definite obligation to submit justiciable disputes to compulsory arbitration. A few treaties were even made without any reservation whatever; but they were only between such Powers as Switzerland, Spain, or Belgium, on the one side, and American or African Republics on the other side, and between Portugal and the Netherlands—that is to say between countries in whose disputes it was most unlikely that any important national interest could be involved. Apart from these few exceptions nearly every treaty included, and indeed was founded on, the Russian reservation that disputes which affected vital national interests or national honour might be withheld from arbitration virtually at the discretion of either of the parties.

But in the attempt to find a certain sphere in which an absolute obligation without reservation could be accepted, some governments agreed to treaties in which the " listing " method of the Russian Draft Convention was reproduced, and in addition to drawing up a specific list of certain classes of treaties or subjects,

disputes concerning which were recognized as justiciable. These governments also took the further step of dropping in respect of them the reservations concerning " vital interests " and " national honour." And all attempts to find a general definition of justiciable disputes which should not be open to valid objections having in the meantime failed, it was on the basis of this method that the second Hague Conference sought to establish a certain measure of compulsory arbitration.

Thus at the second Conference the Portuguese Delegation began the negotiations on the subject by laying a detailed proposal before the sub-commission on compulsory arbitration in which they put forward a list of subjects concerning which an obligation to arbitrate should be accepted without any reservation whatever. This list, contained in their draft Article 16 (*b*), includes, under nineteen headings, such subjects as treaties concerning commerce, navigation, international protection of workers, posts, telegraphs, submarine cables, railways, protection of literary and artistic property, protection of industrial property, private international law, civil or criminal procedure, extradition, diplomatic and consular privileges, pecuniary claims when the principle of indemnity was recognized, international debts, &c.[1] A revised version of this proposal was put forward by the Serbian Delegation [2] and yet others by the British,[3] American,[4] and Swiss [5] Delegations. There was no difference of principle between the original Portuguese draft and the British, American, and other alternatives. The British proposals omitted a few of the Portuguese suggestions, notably diplomatic and consular privileges and extradition, but retained the general international conventions and also treaties relating to private international law and disputes arising out of pecuniary claims when the principle of damage was admitted.

In spite of prolonged discussion and negotiation at the Second Conference, however, all these proposals came to nothing. The opposition to them was led by the German Delegation and to each item of the proposed lists some Power or another made objection, until in the end only two subjects of minimal importance remained. This being so, the Conference rightly decided that the subject was not mature enough to permit of agreement and abandoned the

[1] *Deuxième Conférence Internationale de la Paix,* Actes et Documents, Tome II, Annexe 19, p. 882.

[2] *Ibid.*, p. 890.

[3] *Ibid.*, p. 893.

[4] *Ibid.*, p. 900.

[5] *Ibid.*, p. 889.

attempt, contenting itself with the unanimous declaration concerning the principle of compulsory arbitration which has been quoted above.

A few years later, on August 9, 1911, a treaty was signed between France and Denmark which carried into effect the principles which the second Peace Conference had sought to apply. Article 1 of this treaty provides that " differences of a juridical character " shall be submitted to arbitration if " they do not affect the vital interests, independence or honour of either of the contracting parties nor the interests of third Powers " ; while Article 2 provides that these reservations shall not hold good in respect of a certain list which includes pecuniary claims, contractual debts due to nationals of the other party, the interpretation and application of commercial and navigation agreements and all conventions relating to industrial property, copyrights, posts, &c.

It should also be mentioned that during this period a number of other bilateral treaties had been made—of which the most famous were the Bryan Treaties of 1913–14—which among other things elaborated conciliation machinery for non-justiciable disputes. These treaties were important because they secured increasing recognition for the principle that there must be additional political machinery to supplement the judicial process of arbitration.

In spite of the success of the French and Danish Governments in drawing up a treaty which actually applied the Russian method of " listing " to which the second Hague Conference had been unable to give effect, it may be doubted whether this method was really a good one. It is almost true to say that by its nature it excluded from compulsory arbitration any subject that was of real importance, that is to say, any subject which was likely to lead to a major international dispute.[1] In practice this almost necessarily defeated the purpose of those who pressed most ardently for compulsory arbitration. What in fact was required to achieve their object was some general definition of justiciable

[1] This criticism does not apply with equal force to the analogous system of inserting into individual treaties when they are made an obligation to refer disputes concerning their interpretation and application to arbitration. This system has been widely and successfully used since the war, and as a result the Permanent Court already has general obligatory jurisdiction in a considerable and not unimportant sphere of international relationship.

disputes which would not be open to the objection that it might in practice lead to grave international injustice. The real problem, therefore, was whether such a general definition could be found.

The discussions and negotiations of the period 1890–1914 made it seem useless to hope that it could. In fact in all these negotiations the nearest approach to such a definition was that contained in the original Pan-American Convention of 1890, which provided that all disputes should be submitted to arbitration on the demand of one party, unless " in the judgment of any one of the nations this might imperil its independence." The subsequent Russian reservations concerning " vital interests " and " honour," though they were so often adopted, were only vaguer—and therefore to arbitrationists less satisfactory—elaborations of this original reservation. It is fair to conclude that in 1914, as a result of the discussions of this pre-war period which have been described, it appeared improbable that governments would get nearer to defining " justiciable " than a general agreement that disputes " of a juridical character " should be regarded as justiciable unless they " imperilled independence."

4. Moreover, those international lawyers who gave most attention to the subject were agreed that no closer definition than this was practicable. There were not, indeed, many publicists who took much trouble over the theory of the matter; the chief of those who did was Westlake. His writings may therefore be taken for examination, as being the best available statement of the theoretical and practical difficulties of drawing up a satisfactory definition of disputes suitable for compulsory arbitration; they are also the best statement of the objections in pre-war conditions to proposals for the general compulsory arbitration of all disputes of every kind.

In Westlake's view the reservation of the Pan-American Treaty of 1890 covered all reservations which could be validly admitted; the addition of such phrases as " national honour " or " vital interests " appeared to him unnecessary, and therefore wrong. Conversely, in his view, there were valid objections to any scheme of universal compulsory arbitration which did not allow a state to reserve disputes which might affect its independence. But to understand his conception of these objections it is necessary to examine his use of the word " independence." The meaning he gives to it in this connexion is by no means simple, and since it is essential to the present point it is better to explain it by quoting

his own words. In a paper on the Limits of International Arbitration [1] he says:

"The word 'independence' when used in this connexion is extremely vague. . . . A state is injured in its independence whenever without menacing its separate existence it is hindered in doing or not doing anything that an independent state may justly do or abstain from doing. Such a case will never appear on the face of an arbitrator's sentence, because the sentence will always profess to follow the principles of justice . . . but it will exist in fact whenever the sentence does not really follow the principles of justice. Therefore a clause in an arbitration treaty by which a signatory state is allowed to refuse arbitration whenever in its judgment the controversy imperils its independence will bear the interpretation that it may refuse arbitration whenever in its judgment a decision adverse to it would be so plainly unjust as to be an outrage on its independence."

But Westlake admits that an exception to an arbitration treaty "which was openly expressed to be of that width would go far to destroy the value of the treaty." [2] The exception therefore requires further analysis to explain and justify his contention; and such analysis Westlake gives. His argument turns on his fundamental doctrine of "admissible political claims of states as distinguished from their legal claims arising out of a positive modus vivendi." [3] The "admissibility" of these political claims rests in his view exclusively on the notion of *justice* "by which . . . political claims transcending legal ones are *constituted* and *limited*." [4] Arbitration, he contends, is not a suitable method for dealing with claims of this kind, for what is required to secure justice is not the mere definition and application of existing legal rights, since they "transcend legal claims," but some different and political process. Non-arbitrable, or as we say non-justiciable disputes, are thus those in which injustice will be done by the application or the attempted application of existing legal rules.

But in Westlake's view this idea of justice is best expressed for the purpose of treaty-making by the term "independence," the word being used as he uses and explains it in the quotations which have just been given. The phrase "imperilling independence" is thus the best comprehensive definition that can be made of the political claims for the settlement of which the method of arbitration is unsuitable; that is to say, it is the best comprehensive reservation that can be devised to safeguard "admissible" claims

[1] *International Journal of Ethics*, October, 1896—reprinted in *International Law—Peace*, pp. 350–68.

[2] *Ibid.*, pp. 356–7. [3] *Ibid.*, p. 302. [4] *Ibid.*, p. 305.

which on grounds of justice invalidate an attempt at settlement by the judicial process of arbitration. It is worth noting that Westlake held this view of the matter to be identical in substance with that put forward in the quotations given above from the memoranda of the Russian Delegation to the first Hague Conference—memoranda which he regarded as documents of great merit and great authority.[1]

But before any attempt can be made to inquire how this doctrine applies to the compulsory jurisdiction of the Permanent Court of International Justice, it is necessary to find out in more detail what are the concrete political claims on the nature of which it is founded. As has been said, Westlake regarded these claims as being conveniently summed up in the phrase which reserved questions affecting " independence." But he was never content, as so many publicists on international law have been, with conceptions put forward in attractive phraseology without clear analysis of what the phrases meant. Once again it is best to reproduce his analysis in his own language.

In his chapter entitled " The Political Action of States " he says that there are " three classes of cases in which political action is justifiable : one is that in which no rule meeting the circumstances has been sanctioned by the consent of the international society. . . . The second class is that in which opinion is felt to be outgrowing the rule, so that a change in the law may be asserted in good conscience to be necessary, and yet, from the want of an international legislature it is difficult to effect such change otherwise than by setting the example of it. And the third is that of an imperfect right, given by general opinion, although there is no international organ capable of defining the circumstances for its existence with the precision necessary for a rule. . . . These three classes correspond to the cases arising in the internal affairs of a state in which the action of the legislature is required to supplement, to amend or to define those rules of law which the judicature has to apply, or to give relief in particular cases where sufficient definition is impossible. Action in them by a state is political just as the action of a legislature is political. It stands towards international law considered as a body of rules, that is as positive, very much as the action of parliament stands towards the law of the land. . . . Till ' the parliament of man ' becomes a fact, states have to do for themselves what parliaments do for individuals. Of

[1] Cf. *Peace*, pp. 300–6.

course in doing it a state . . . is bound, like a legislature, to respect the principles of distributive justice ; to be sure that all its action, if only on the fringe or borderland of law, is within the domain of right." [1]

To summarize his view and to show that unless it fall within these three classes of case " political action " is not justifiable, Westlake further uses the following words :

" The cases in which the positive law of nations needs to be supplemented, amended or precisely defined in order to bring it into conformity with justice or right, or in which justice or right direct that particular relief from the positive law should be allowed, appear to cover between them all the admissible political claims of states as distinguished from their legal claims."

These three classes of case, then, were in Westlake's view those in which a universal system of compulsory arbitration would not in his day have provided a just solution. Their existence constituted for him the only really valid objection to the establishment of such a universal system, and it is to this objection, therefore, that our attention must be given.

It must be noted that the essence of this objection lay in the fact that at the stage in the development of the society of states at which Westlake wrote, there were no permanent and organized international political institutions. And it is this vital fact which provides the clue which must be followed in examining to what extent his argument applies to-day to the obligatory jurisdiction of the Permanent Court under Article 36 of its Statute. In proceeding now to make this examination it will be useful to take each of Westlake's three classes of case in turn and to inquire, with his concrete illustrations in mind, what difference, if any, is made to his various contentions by the existence of the permanent political institutions of the League of Nations ; to inquire, that is to say, whether the " parliament of man " is established by these institutions in a sufficient degree to remove the difficulties he pointed out.

5. The first class of case, then, is " that in which no rule meeting the circumstances has been sanctioned by the consent of the international society." A case of this kind may arise in two possible forms.

The first is that of a dispute arising out of a relationship for which the members of international society have hitherto held that no general rule is necessary or desirable. If an attempt were

[1] *Peace*, p. 302.

made in such a dispute to rely on the legal process of arbitration alone it would amount, as Westlake points out, to condemning all international action which could not show legal grounds. "Not much time," he says, "need be spent in repudiating a view of international duty which, for example, would condemn all interference on behalf of the Armenians or the Cretans because it is impossible to qualify the independence of the Sultan or any other Power by legal definition." [1]

The last words of this sentence go too far. It is not "impossible" to qualify the independence of states by legal definition in any respect whatever, if the states are willing to accept such qualification. In fact the numerous international conventions for the protection of racial, religious, and linguistic minorities now in existence do "qualify the independence" of many powers "by legal definition" in exactly the way which Westlake called impossible; and, moreover, they create a definite right of "international action" through the machinery of the Council of the League of exactly the sort which Westlake thought to be necessary, even when no right existed. In respect of the matter which Westlake took as an illustration, therefore, these treaties go far towards removing the objections to arbitration which he put forward; but of course they only do so by changing the character of the case, and by creating legal rights where previously there were no legal rights on which action could be based.

But, even in cases in which there are no legal rights of a specific kind, his objections seem to be no less adequately met by the establishment of the Assembly and Council of the League and by the wide powers given to the Members of the League to use this machinery under Article 11 of the Covenant. For all the situations of which Westlake was thinking and which he illustrated by his reference to Cretans and Armenians, in which political action or pressure may be required, would be covered by Article 11, under which any Member of the League may "bring to the attention of the Assembly or of the Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends." This plainly provides an adequate basis for action of the kind which Westlake thought necessary. Moreover, action taken in pursuance of this right under Article 11 is definitely recognized as political action; it is emphatically distinguished

[1] From the paper written in 1896, quoted above.

from action taken in respect of legal claims. If the obligatory jurisdiction of the Permanent Court were accepted, therefore, no plea of exclusive legal right, no plea that a question is justiciable and should therefore be settled by the Court in accordance with the rules of international law, could invalidate such action under Article 11. If this had been open to doubt, it would have been removed by Article 5, paragraph 3, of the Geneva Protocol, in which it is categorically laid down that even a verdict of the Permanent Court declaring that a cause of dispute lies within the domestic jurisdiction of a given state—i. e. the most extreme of all cases—shall not prevent the *political* consideration of the situation by the Council or by the Assembly under Article 11.

This form of Westlake's first class of political claim does not, therefore, furnish a valid objection to the obligatory jurisdiction of the Permanent Court.

The second form which this class of case may take is that in which, although the members of the international society recognize that there might be or ought to be a rule of law, no such rule does in fact exist ; or that in which, if a rule is held to exist, its meaning is disputed. It thus covers all disputes which arise out of relationships between states for the control of which the existing system of international law does not make adequate provision. Such gaps occur to a greater or less extent in every legal system of whatever kind ; they were particularly wide in the system of pre-war international law, and therefore of particular importance in Westlake's mind. They have been greatly reduced by the developments of international law which have occurred in recent years ; but no doubt there are still relationships for which there are not the agreed and recognized rules of international law which are required ; and for disputes arising out of such relationships settlement by judicial process is evidently not an adequate method of procedure. But this fact does not constitute a valid objection against granting obligatory jurisdiction to the Permanent Court in justiciable disputes, in the way that it used to constitute a valid objection against universal compulsory arbitration in Westlake's day. For there are in connexion with the obligatory jurisdiction of the Court three important safeguards which result from the creation of the new international institutions of the League, none of which then existed. These three safeguards are as follows :

(i) It might occur that all the parties to a dispute agreed that there was no recognized legal rule by the application of which it

could be settled; this indeed would usually be so in the case of political claims of the kind under consideration. At the present time such a dispute would as a matter of mutual right and obligation be dealt with by the political process which the Covenant provides for non-justiciable disputes, i. e. through the action of the Council under Articles 12–15. Though a process similar to this (but of course only facultative, and not obligatory, as it is under Articles 12–15) was hinted at in the suggestions for organized "mediation" put forward in the Russian Memoranda quoted above, the pre-war proposals for universal arbitration which Westlake criticized included nothing of the kind. His most serious objection to compulsory arbitration arising out of this first class of political claim is thus met and removed by Articles 12–15 of the Covenant.

(ii) It might, however, occur that the parties differed as to whether or not there was an applicable rule of law in accordance with which their dispute could be settled by judicial process. Under a system of universal compulsory arbitration in pre-war conditions such a situation would have caused grave embarrassment to an *ad hoc* arbitral tribunal; its members would have found it very difficult to decide between rival governments on such an issue. But the last paragraph of Article 36 of the Statute of the Court provides that "in the event of a dispute as to whether the Court has jurisdiction the matter shall be settled by the decision of the Court." If the obligatory jurisdiction of the Court were accepted, this paragraph would give to its members the power to settle in case of doubt whether there is an existing rule of law or not. It would have been unfair to expect the members of an *ad hoc* pre-war arbitral tribunal chosen by the parties to a dispute to decide between rival governments upon such an issue as the existence or non-existence of rules of international law; they would clearly have been in a most difficult situation. But it is equally clearly a proper function of the Permanent Court to do so; there could be no better body for making such decisions. This provision of Article 36 of the Statute provides, therefore, a second safeguard which was not part, and which could not by the nature, position and functions of arbitral tribunals have been part, of the pre-war proposals for compulsory arbitration. It is also worth noting that if a dispute is decided by the Court to be non-justiciable, because there is no law, it would of course be dealt with under the Covenant by the Council in accordance with

Article 15. This fact will make the Court less reluctant than it might otherwise be to decide in case of need against its own jurisdiction.

(iii) But there is a third important safeguard contained in the terms of Article 36 itself. That article provides that Members of the League in accepting the jurisdiction of the Court may do so in respect "of *all or any* of the classes of legal disputes" enumerated in the article. In other words, Article 36 allows states which accept the obligatory jurisdiction of the Court to *except* any of the classes of legal dispute so enumerated. The effect of this power, which was specifically reasserted by Article 3 of the Geneva Protocol, is to allow a state to make a special reservation concerning any matter on which it may feel that although disputes arising out of it might *prima facie* seem to be justiciable, nevertheless the relevant rules of international law are so vague or so much disputed as to render a judicial process unsuitable. In this way, for example, the British Government would be able to make reservations concerning cases arising out of the rules of international law relating to naval war. In the British view there are no rules of international law for naval war which have received sufficiently general recognition and acceptance to make their application by a court of justice a satisfactory procedure. It might well be that even in this case the second safeguard already mentioned would suffice; that the Permanent Court if called upon, for example, to consider a case arising out of naval warfare would decide in virtue of the last paragraph of Article 36 of the Statute quoted above that it had no jurisdiction. But in case a government were in doubt as to what action the Court might take on questions of this kind to which it attached a great importance, the power to make reservations would surely provide the utmost guarantees it could desire.

It would appear, therefore, that this first class of political claim furnishes no valid objection to the obligatory jurisdiction of the Permanent Court, since in no case could injustice result from it.

6. We may take next that class of admissible political claims which result from what Westlake calls "imperfect rights." Of imperfect rights he says "that the complexity and variety of circumstances would often make it impossible, even if an international organ existed, that it should pronounce its judgment in the form of a rule." [1] This impossibility constitutes his objection

[1] *Peace*, p. 301.

to the process of compulsory arbitration as applied to disputes arising out of such " imperfect rights."

It may be well to illustrate his point by quoting some examples of " imperfect rights " which he discussed. He takes as typical of the class rights concerning the navigation of international rivers and the extradition of criminals, and he says :

" Doctrine may lay down that extradition ought to be granted only for grave crimes but it cannot determine precisely for what crimes. . . . Doctrine may lay down that a state ought not to bar a peaceful passage across its territory, along a river, or hamper it by customs duties, but it cannot determine the measure in which those who use the passage ought to contribute to the cost of maintaining the navigation or the regulations to which they ought to be subject for the security of the state across which they pass. Therefore extradition and the peaceful navigation of international rivers must be ' imperfect rights ' in the sense that conventions are indispensable to their due enjoyment. But it does not follow that there is in them no element of law." [1]

Elsewhere discussing extradition and the navigation of international rivers he says that the " true description " of rights in these matters is " imperfect legal rights." [2]

The question which has now to be answered is whether the same difficulty would face the Permanent Court if it were called upon to deal with a dispute arising out of an imperfect legal right as would have faced an arbitral tribunal acting in virtue of a treaty of compulsory arbitration before the war.

First, it is not irrelevant to point out that, largely as the result of the creation of the permanent political institutions of the League of Nations, many " imperfect rights " previously only recognized as general principles of international law have now been supplemented by special or general international conventions laying down in considerable detail their legal application. This, for example, is the case with rights of navigation on international rivers and with rights in respect of other kinds of international transit ; the main principles of international law have been elaborated and defined in certain sections of the Treaties of Peace and in the various Transit Conventions—six in number—agreed to by the Transit Conferences held at Barcelona in 1921 and at Geneva in 1923. These Conventions, by mitigating or wholly removing the " imperfect " character of the rights with which they deal will undoubtedly remove many of the difficulties with which pre-war arbitral tribunals might have been faced in disputes

[1] *Chapters on the Principles of International Law*, pp. 74–5.
[2] *Peace*, p. 157.

concerning their application. So much has this been felt to be the case, indeed, that the Transit Conventions actually contain a provision by which the signatories agree to the obligatory jurisdiction of the Permanent Court in all disputes as to their interpretation and application.[1]

Second, it is possible to say that even for rights which remain in the strictest sense "imperfect" the creation of the political institutions of the League has provided a machinery which would secure their effective application. If, for example, a dispute should arise as to whether a state had a right of transit along a given river and, if so, on what conditions, the matter might, if its obligatory jurisdiction had been accepted, come in the first instance before the Permanent Court. The Permanent Court would decide the question of principle, leaving the Council of the League to settle by negotiation the conditions on which the right, if such existed, should be exercised. This the Council would be able to do in virtue of Articles 12–15 of the Covenant; it would no doubt in practice act upon the advice of the technical experts of the Transit Commission of the League.

The existence of this supplementary political procedure would relieve the Court of any difficulties or embarrassments with which before the War an arbitral tribunal might in such a case have been faced.

A similar argument could be adduced in respect of any dispute arising out of imperfect legal rights. It would not appear, therefore, that the obligatory jurisdiction of the Court could in any way lead to injustice in respect of political claims of this second class, nor could such claims seriously embarrass the Permanent Court.

7. The remaining class of political claim in respect of which Westlake believed compulsory arbitration to be open to valid objection is that "in which opinion is felt to be outgrowing a rule, so that a change in the law may be asserted in good conscience to be necessary, and yet from the want of an international legislature it is difficult to effect such change otherwise than by setting the example of it."[2] Together with this class may be considered—although Westlake classes them rather differently—disputes which arise out of the obsolescence of treaties. In all claims of this kind where justice might demand the non-application

[1] e.g. Article 13 of the Barcelona "Statute on Freedom of Transit."

[2] *Peace*, p. 301.

or the change of existing legal rights, Westlake held that in his day compulsory arbitration could not be applied.

Moreover, claims such as these, and especially claims arising out of the obsolescence of treaties, bulked very large in the minds of pre-war international lawyers. The difficulty of applying compulsory arbitration to them is vigorously stated in the following passage from the Russian Memoranda of 1899 above quoted :

" Actuellement les droits et les obligations réciproques des états sont déterminés dans une mesure notable par l'ensemble de ce qu'on nomme les traités politiques. . . . Ces traités lient la liberté d'action des parties tant que restent invariables les conditions politiques dans lesquelles ils se sont produits. Ces conditions venant à changer, les droits et les obligations découlant de ces traités changent aussi nécessairement. . . . Les puissances qui ont une part active dans la vie politique de l'Europe ne peuvent donc soumettre les conflits surgissant sur le terrain des traités politiques à l'examen d'un tribunal d'arbitrage, aux yeux duquel la norme établie par le traité serait tout aussi obligatoire, tout aussi inviolable, que la norme établie par la loi positive aux yeux d'un tribunal national quelconque." [1]

It is plain that in any society the members of which regulate their relations in accordance with established law, the requirements of justice demand that there be some provision for modifying or giving relief from the application of existing legal rights. In proposing universal compulsory arbitration without reserve for all international disputes, the pre-war arbitrationists failed to recognize this necessary limitation imposed by the very nature of international society upon the unrestricted application of the judicial method they advocated. The question now to be considered is whether the objections on this ground which were valid against their proposals still hold good against the obligatory jurisdiction of the Permanent Court in the changed conditions of the present day.

It is certainly the most difficult of the points so far considered ; it is not by accident that a great part of the political controversy concerning the Geneva Protocol has centred on this question, though in a somewhat different form from that in which it must be considered here. But the answer appears none the less plainly to be that the objections to universal compulsory arbitration in pre-war conditions do not hold good against the obligatory jurisdiction of the Court to-day. The reasons for this view are two :

First, it may be fairly held that the Permanent Court of International Justice would be able to meet part of the difficulty

[1] Misc., No. 1, 1899, C. 9534, p. 42.

in a way in which pre-war *ad hoc* arbitral tribunals could hardly have done, by the judicial application of the doctrine of international law known as *rebus sic stantibus*. Some lawyers may well doubt whether the doctrine of *rebus sic stantibus* is sufficiently developed to be capable of application by the Permanent Court. It must be admitted that the doctrine has a bad name, for the reason that, in Oppenheim's words, " it can be, and indeed sometimes has been, abused, for the purpose of hiding the violation of treaties behind the shield of law." [1] Indeed, the most famous cases in which states have claimed to act in virtue of the doctrine have been the action of Russia in 1871 in respect of the Black Sea, and the action of Austria-Hungary in 1908 in respect of Herzegovina—both of them occasions when the action taken is difficult to justify on legal grounds. On those occasions Russia and Austria were undoubtedly in the wrong in form, if not in substance,[2] because, to quote Oppenheim again, " the clause *rebus sic stantibus* ought not to give the right to a state at once to liberate itself from the obligations of a treaty, but only to claim to be released from these obligations by the other parties to the treaty." [3]

But there have been other occasions, less discussed in textbooks on international law, when the doctrine of *rebus sic stantibus* has been effectively and justifiably applied. One such occasion was the dispute between France and Great Britain in 1908 concerning an eighteenth-century treaty relating to fishery rights in Newfoundland. France claimed that the dispute, turning, as it did, on the interpretation of a treaty, fell clearly within the terms of the Franco-British Arbitration Treaty of 1903. Newfoundland, however, informed the British Government that if the dispute were submitted to arbitration and the arbitrators upheld the French contentions Newfoundland would leave the Empire; and Great Britain in consequence refused arbitration, basing her action on the ground that the dispute fell within the treaty reservation of " vital interests." The phrase " vital interests " no doubt adequately covered the British contention, but its true justification was the doctrine of *rebus sic stantibus*, under which it was plainly open to Great Britain to plead that, in view of the growth of a large self-governing population in Newfoundland, conditions

[1] Oppenheim: *International Law*, Vol. I, p. 573, second edition.

[2] Some English writers have held that in substance Russia's claim was justified, e.g J. S. Mill. Westlake appears to support the same view.

[3] *International Law*, Vol. I, p. 575, second edition.

had changed so profoundly as to abrogate the undertakings she had given more than a century before.

The doctrine of *rebus sic stantibus* is, then, not only well recognized in the text-books, but can be, and has been, justifiably applied in the practical legal relations of states ; and it is therefore a doctrine which it may fairly be argued the Permanent Court ought to be able to apply. Indeed, in his comprehensive and learned new edition of Hall's *International Law*, Professor Pearce Higgins suggests in his additional notes to Hall's remarks on the subject, that " any Member (of the League) should be empowered to bring a case for the voidance of a treaty before the Permanent Court of International Justice." [1] It may be suggested with deference that no new special power is needed ; that if the obligatory jurisdiction of the Permanent Court were accepted under Article 36 of the Statute it would automatically be open to any party to a dispute to claim the voidance of a treaty or the non-application of a rule of international law by a plea based on the doctrine of *rebus sic stantibus*. No doubt if faced with such a plea the Permanent Court would have a most difficult task to fulfil. But if they sought to apply in a judicial spirit the scientific principles expounded, for example, by Hall [2] and other leading writers, it may well be hoped that they could agree on a verdict which would command the respect of lawyers and the acceptance of the parties.

Such a task, however, while it ought not to be beyond the powers of the Permanent Court, would almost certainly have overstrained the powers and the authority of a pre-war *ad hoc* arbitral tribunal. It may therefore be concluded that while political claims based on the doctrine of *rebus sic stantibus* must virtually have been excluded from compulsory arbitration in pre-war conditions, to-day they would, owing to its superior legal organization, fall within the effective competence of the Permanent Court if it had obligatory jurisdiction under Article 36 of its Statute.

Second, there is now a further safeguard against injustice in connexion with disputes relating to the non-application or change of existing legal rights. This safeguard consists in the supplementary political process for securing change provided by Article 19 of the Covenant :

" The Assembly may from time to time advise the reconsideration by

[1] Hall : *International Law*, p. 407, eighth edition. [2] *Loc. cit.*, § 116.

Members of the League of treaties which have become inapplicable and the consideration of international conditions whose continuance might endanger the peace of the world."

This is a definite, though no doubt an embryonic, political process of legislation for changing existing legal rights by collective action. It is founded on the new and important principle that the alteration of contractual or other legal rights may be effected by general discussion of members of the community of states on the basis of the general interests of society. It was adopted by the authors of the Covenant definitely and consciously as a supplement to Article 10, which was intended to stabilize (but *not* to stereotype [1]) the *status quo*, by abolishing the right of conquest by force; and it was designed to meet and remove injustices which might result from the application of existing legal rights, whether those rights derived from territorial arrangements or from other rules of international law. It is of fundamental importance to the present point because if a dispute relating to the injustice of existing legal rights were, in virtue of its obligatory jurisdiction under Article 36, referred to the Permanent Court, and the Court were compelled, as it well might be, to uphold the legal validity of those rights, such a verdict would not debar the plaintiff state from demanding change or relief by means of this political process of Article 19.

It may be objected that this new political process of quasi-legislation is of no value to the present argument since it can only operate by unanimity, that is to say with the consent of the state whose existing legal rights are called in question. But the logical conclusion of this argument appears to deprive it of validity. If no legislative process will be of value in the society of states until the system of majority voting is generally accepted, the progress of the legal organization of that society will be indefinitely arrested. For majority voting, which means a practically complete system of political federation, would not be accepted to-day and will probably not be accepted for a long time to come by the governments of the world. It is a hard doctrine to maintain that until political federation is possible no further progress towards the ideal of legal justice among states can be made.

[1] Vide Report of Amendments Committee of the League, 1921, and discussions of first Committee of second Assembly on proposed Canadian amendment to Article 10. Cf. also the Allied Reply to the German Delegation on the Draft Treaty of Versailles, June, 1919.

Moreover, it may fairly be held that the political process of Article 19 would in fact have a great practical value. That argument, however, is a matter primarily of politics, hardly suitable at the present state of development for detailed discussion in the *British Year Book of International Law*. Enough has perhaps been said to justify the conclusion in respect of political claims relating to matters in which " a change of the law is necessary," as in respect of the other classes of political claims, that Westlake's objections to a system of compulsory arbitration no longer hold good against the obligatory jurisdiction of the Permanent Court. If it be put in Westlake's language, this conclusion means that the political institutions of the League constitute in so adequate a measure a true " parliament of man " that states need no longer " do for themselves what parliaments do for individuals," but can now act in assertion of their political claims through these political institutions. If this view is accepted it justifies the practical contention that the British Government could rightly co-operate with other governments in giving obligatory jurisdiction to the Permanent Court under Article 36 of its Statute without fear that by so doing it would bring injustice either upon itself or upon the other members of the community of states.

SHIPS OF WAR AS PRIZE

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I

It is stated by the late Professor Pitt Cobbett in his *Leading Cases in International Law*, that enemy warships become at once the property of the Crown on capture, and are not treated as Prize, nor is their capture subject to adjudication by the Prize Courts.[1] And the late Professor Oppenheim, after asserting the necessity for condemnation by a Prize Court to pass the property in captured enemy private property to the captor, says: "On the other hand, the effect of seizure of public enemy vessels is their immediate and final appropriation."[2] Sir Samuel Evans, in delivering judgment on September 16, 1916, (unreported) in the case of *The Baden* and *The Santa Isabella*, two German colliers attached to Admiral von Spee's fleet, and sunk in the Battle of the Falkland Islands, also appeared to be under the impression that since public enemy vessels passed at once to the captor, they were not the proper subject of prize proceedings. He said:

"It is quite clear that both these vessels were enemy vessels. They were also apparently in attendance upon the vessels of the German Government. But they are here treated not as part of the fleet, but as enemy vessels which could be properly treated as Prize."

It should be added that no grant of prize had been made by the Crown at this date.

These views, so far as they state that on the capture of an enemy public ship, the property passes at once to the State, undoubtedly represent the generally accepted rule of international law, but in so far as they suggest that public enemy ships are not treated as prize in British Prize Courts, they do not accord with the practice of the Courts. There is, however, a nearer approach to uniformity of practice in foreign Prize Courts in this matter, as will be seen from the following evidence:

[1] Vol. II, pp. 275, 311. [2] *International Law*, II, sec. 185.

The United States. It has been held in the United States that the property in a vessel which had been fitted out as a gunboat by the Confederate States passed immediately on capture to the State without the necessity of Prize proceedings.[1] And the United States Attorney-General in 1900 gave it as his opinion that Spanish vessels wrecked in battle by the naval vessels of the United States during the war with Spain, and lying along the coast of Cuba, were the property of the United States.[2] Article 99 of the Instructions for the Navy of the United States governing naval warfare (June 30, 1917) is to the same effect :

" By the fact of capture a public vessel in the military service of the enemy passes into the possession of the captor's government, in which title immediately vests. The vessel, therefore, becomes a public vessel belonging to the captor's Government, and subject to its disposal. It is unnecessary to send a captured public vessel into port for adjudication. The vessel may immediately be converted to the use of the captor, and sent to any port at its convenience, as a public vessel of the United States."

France. The French *Instructions sur l'application du Droit International en cas de guerre* (June 30, 1916), after describing the procedure to be observed after the capture of a merchant ship, or a privateer furnished with Letters of Marque by a Power not a party to the Declaration of Paris, 1856, states in Article 118 :

" Dans le cas de capture d'un bâtiment de guerre, vous vous bornerez à le constater sur votre journal et vous pourvoirez à la conduite de la manière la plus conforme à la sécurité des équipages auxquels vous la confierez."

Italy. By Article 227 of the Italian Code for the Mercantile Marine, 1877, it is provided that captured warships pass to the Italian Ministry of Marine. A case illustrating this is *The Kaiserrie*, a Turkish vessel which was captured by an Italian warship during the Turco-Italian war, on December 18, 1911. *The Kaiserrie* was proceeded against in the Italian Prize Court, and condemnation was resisted on the ground that she was a hospital ship and therefore not liable to capture under the Third Hague Convention, 1899. The Court held that she was in fact a Turkish warship which had been used as a transport, and accordingly ordered her to be placed at the disposal of the Ministry of Marine.

Germany. The German Prize Court Regulations of April 15, 1911, provide as follows (Sec. 2) :

" Prizes within the meaning of this Ordinance are enemy or neutral merchant vessels, i. e. all vessels not being the property of the state, as well as all enemy or neutral goods, &c."

[1] *Oakes* v. *U.S.*, 30 Ct. Cl. 378. [2] J. B. Moore, *Dig. Int. Law*, VII, p. 563.

Public vessels are thus expressly excluded from the definition of prize.

Russia. The Russian Prize Regulations of July 14, 1895, provide as follows (Art. 10):

" Ships of war and merchant vessels of the enemy are subject to condemnation as prizes, as well as articles on board " with certain exceptions.

The foregoing examples are sufficient to show that there is not complete uniformity in the treatment of enemy warships by states as regards Prize Court proceedings.

II

The treatment of ships of war as prize by British Prize Courts is governed by Statutes, Royal Proclamations, and Orders in Council, and the matter is closely connected with the grants of prize to captors.[1]

Under the Commonwealth, an Ordinance of 1649 directed

" that in all prizes taken from the enemies of the Commonwealth, a moiety should be given to the captors, and that the other moiety should be disposed in the names of the Treasurer of the Admiralty, to raise a fund for charitable purposes, rewards, &c. For all enemy's ships of war, burnt, sunk, or destroyed, was to be paid, for an Admiral's ship £20 per gun; for a Rear-Admiral's, £16 per gun; for other ships of war, £10 per gun." [2]

An Act of 1661, passed for the better regulation and discipline of the Navy, only incidentally mentions the interest of captors in prizes directing

" that nothing shall be taken out of a prize ship, till condemned; that an account should be given of the whole without fraud, on pain of such punishment as the Court Martial or Admiralty Court shall inflict except everything above the gun deck; but arms, ammunition, tackle, furniture or stores, which are not to be touched."

This practice of allowing pillage was an ancient one, but does not appear in the later statute of 4 and 5 Will. and Mary, c. 25, which makes provision for the division of the proceeds of the prize, giving one-fifth to their Majesties in case of captures by

[1] The history of prize has been carefully studied by Mr. R. G. Marsden in three articles in the *English Historical Review* in 1909, 1910, and 1911; he has also edited for the Navy Records Society two volumes on *The Law and Custom of the Sea*, where much valuable information is to be found. Sir Christopher Robinson in his *Collectanea Maritima* brought together a number of public instruments illustrative of the history and practice of Prize Law to which he added some valuable notes. Mr. E. S. Roscoe has recently published *A History of the English Prize Court* (Lloyd's, 1924).

[2] Scobell's *Acts*, April, 1649; C. Robinson, *op. cit.*, 193; R. G. Marsden, *Eng. Hist. Rev.*, 1911, p. 37.

privateers, and one-third in cases of captures by ships of the Royal Navy. It reappears again in a Prize Proclamation of 1702 which orders prizes to be condemned and sold openly " by inch of candle to the best advantage " and one half of the net proceeds to be paid to the captors,

" but all such ships of war of France or Spain, or privateers of either of those nations which may be fit for H.M.'s service are not to be disposed of till such time as H.M. shall have the refusal thereof. And in case H.M. shall take any such ship into her service, the captors shall have £10 per ton for the ships of war, and the whole of such privateers taken as aforesaid, according to appraisement, except one-tenth part to the Lord High Admiral."

The provisions as to pillage give officers and crews of H.M. ships all goods and merchandises as may be found on any ship they shall take in fight upon or above the gun-deck. The gun-money provisions of the Proclamations give to any of H.M. ships of war as should take in fight, or sink, fire or destroy any enemy ship of war, as a reward for each piece of ordinance whether iron or brass in any ship of war, &c., so taken or destroyed, £10 to be paid out of H.M.'s share of prizes.[1]

The Prize Act of 1708, an Act for the encouragement of a particular service on the coasts of America, for the first time gave to the captors the *whole* interest in Prizes taken in America, and in the same session of Parliament a general Act was passed transferring the whole benefit from the Crown to the captors. The Act was limited to the then existing war, but corresponding provisions were inserted in Acts passed at the beginning of subsequent wars. The provisions regarding the allocation of the values of condemned enemy warships and privateers to the captors are explicit, but there is a provision for the appraisement of ships taken into the Queen's service, by persons appointed by H.M. or the Admiralty and an equal number appointed by the captors.

" Gun-money " was changed to " Head-money "; Sec. 8 gave £5 for every man living on board any enemy ship of war or privateer at the beginning of the engagement. " Head-money " became permanent, but it is now, by the Naval Prize Act, 1864, called " Prize Bounty."

Prize Acts subsequent to the Act of 1708 were framed on similar lines, though many of them were of greater length and dealt more fully with questions of prize law. Grants of Prize

[1] R. G. Marsden, *Law and Custom of the Sea*, II, p. 186.

to the captors were made by Royal Proclamation, confirmed by Prize Acts passed at the beginning of all subsequent wars down to 1914, except in the case of a war with Turkey in 1807. In the course of this war various captures were made, and taken into Malta and Gibraltar. These Vice-Admiralty Courts not having received any Commission to proceed to adjudication, and the captors having no authority to detain the prizes in their own names, no Prize Proclamation having been issued, such vessels and cargoes were handed over to the Receiver of Droits, and sold by him and the proceeds transmitted to England. On December 5, 1808, nearly two years after Turkey had declared war against England, an Order in Council was issued to the Court of Admiralty, "to judicially proceed upon the said Turkish ship of war, *Badere Zaffer*, and . . . upon proof that the said ship was a ship of war bearing the flag of the Ottoman Empire to adjudge and condemn the same as good and lawful prize to His Majesty." There was a direction, after condemnation, for the sale of the vessel, and for the distribution of the proceeds in accordance with the General Proclamation for the distribution of prizes. It was not till September 29, 1812, that the Prize Court was empowered to deal with other captures taken in this war, and the proceeds of the sale of the prizes were not vested in the captors, as had been the case in former wars, but in His Majesty.[1]

III

The Naval Prize Act, 1864, together with amending Acts and Orders in Council, is the basis of the modern law relating to prize procedure. Section 55 expressly states that nothing in the Act shall give to the officers and crews of H.M. ships of war any right or claim in or to any ship or goods taken as prize or the proceeds thereof; it being the intent of the Act that officers and crews should continue to take only such interest (if any) in the proceeds of prize as may from time to time be granted by the Crown. No grant of prize was made to the officers and crews of H.M. Navy at the beginning of the war in 1914. In 1918 a Naval Prize Act was passed (8 and 9 Geo. V, c. 30) under the authority of which a Royal Proclamation was issued creating a Naval Prize Fund composed of the net produce of all prizes captured during war as should be declared by the tribunal

[1] H. C. Rothery, *Prize Droits*, p. 95.

appointed by the Act to be Droits of the Crown, to be distributable according to the terms of that Act. Proceedings in prize still remained under the Naval Prize Act, 1864, and the amending Acts and Orders in Council.

The Naval Prize Act, 1864, and the Prize Court Rules, 1914, contain provisions for dealing with captured enemy warships. Section 16 of the principal Act orders that enemy ships taken as prize, and brought into port within the jurisdiction of a Prize Court, shall forthwith, and without bulk broken, be delivered up to the Marshal of the Court. 4 and 5 Geo. V, c. 13, section 1, repeals certain provisions of the Act of 1864, but provides that nothing in such repeal shall have the effect of extending Section 16 of that Act to ships of war taken as prize, and accordingly that section shall have effect as if the following words were inserted therein: "Nothing in this section shall apply to ships of war taken as prize." This provision was to enable proceedings to be taken against ships of war without the necessity of placing the ships under the custody of the Marshal. As we have seen, such ships were frequently purchased into the Navy before proceedings in prize were taken. There is also a further provision (Sec. 30) under which captors can include in one adjudication any number, not exceeding six, of armed ships not exceeding 100 tons each taken within three months next before institution of proceedings. Various provisions in the present Prize Court Rules also refer to prize proceedings relating to ships of war, including a form of condemnation (e. g., I, 1; X; XV, 1; XXXIII). It is therefore clear that the older Prize Acts as well as those at present in force make express provision for ships of war being made the subject of proceedings in prize. It is, however, to be noted that though a capture may come under the definition of prize, it does not necessarily pass to the captors, and as all prizes belong to the Crown, if no grant is made every prize captured would be adjudged to the King *jure Coronae* and would be condemned to him.[1]

[1] *The ships taken at Genoa*, 4 C. Rob. 388.

IV

When we turn to the reports of Prize Cases there is singularly little information to be found regarding the proceedings against ships of war. This is as might well be expected, as in the majority of cases they would be undefended, and no point of law would arise. Sometimes, however, the interest of the alleged captor would be challenged by another ship and questions of joint capture be raised by single ships, squadrons, or fleets. The army might sometimes claim to share in the proceeds of prizes taken by a conjoint naval and military expedition. In such cases interesting and frequently difficult questions of law and fact would arise, and there are a number of cases of this type in the old prize reports.[1]

It has already been noticed that special provisions for the incorporation into the Royal Navy of suitable captured enemy vessels were made by the Statute of 1708. The subsequent Prize Acts do not appear to have contained similar provisions, but it long remained a common practice for captured enemy ships to be added to the Navy in this way. Whether they were first condemned, or condemned at all, it was by no means easy to ascertain, but a search in the Admiralty Library, and the assistance of the authorities at the Public Record Office enabled definite information to be obtained. A typical case is that of *La Hoche* and her consorts, captured off Tory Island on the coast of Ireland during the attempted descent of a French force. *La Hoche* was captured on the 12th October, 1798, and appears in the Navy List as *The Donegal* on the 21st December of the same year. In this case proceedings appear to have been taken in the ordinary way for the condemnation of the vessels, and *La Hoche* was condemned on the 5th February, 1799. One other case will suffice, that of " the famed *Belle Poule* " referred to in the old song " The Arethusa." She was captured off the coast of France on the 14th July, 1780, and appears in the Navy List on the 16th August, 1780, but she was not condemned until the 20th September following. In all the cases examined there is a record of condemnation.

The value of the warships awarded to the captors was that

[1] *The Minerva* (6 C. Rob. 396) ; *The L'Alerte* (6 C. Rob. 238) ; *The Matilda* (1 Dod. 367) ; *La Bellone* (2 Dod. 343) ; *The L'Etoile* (2 Dod. 106). See also the American case of *The Georgia* (7 Wall. 32).

of " the hull, ordinance and ordinance stores " and notices of distribution of Prize Money in the *London Gazette* state the proportions of the hull and stores (and in some cases, head money) arising from the capture.

But when enemy warships were destroyed the loss of Prize Money thus occasioned was felt to be a serious matter for the Fleet, and two examples taken from the life of Nelson show how he regarded the matter.

After the battle of the Nile, Nelson appointed Alexander Davison sole agent for the captured ships. Before leaving Egypt, he ordered three of these to be burnt, owing to the difficulty and delay in fitting them for passage to Gibraltar. In regard to this action of his he wrote to the Admiralty :

" I rest assured that they will be paid for, and have held out that assurance to the squadron. For if an Admiral after a victory is to look after the captured ships and not to the distressing of the enemy, very dearly indeed must the nation pay for the prizes. I trust that £60,000 will be deemed a moderate sum for them. . . . An Admiral may be amply rewarded by his own feelings and by the approbation of his superiors, but what reward have the inferior officers and men but the value of the prizes." [1]

In the Battle of Copenhagen, six battleships and eight praams were taken, but all of them except *The Holstein* (64 guns) were burnt by order of Admiral Hyde Parker, the Commander-in-Chief. Nelson took up the cause of those who had thus been deprived of Prize Money. He asked for a message from the King to the House of Commons for a gift to the Fleet ; " for what," he asked, " must be the natural feelings of the officers and men belonging to it, to see their rich Commander-in-Chief burn all the fruits of their victory, which if fitted up and sent to England (as many of them might have been by dismantling part of our fleet) would have sold for a good round sum." [2]

It appears to be clear that the necessity for proceeding in prize to be taken in British Prize Courts in the case of enemy warships arises from the provisions of the Royal Proclamation granting prizes to the captors which it has been the custom of the Crown to issue. The interest of the captors only becomes effective after condemnation has been decreed. If there has been no grant of prize, it does not appear that proceedings in prize are necessary, as the property would pass to the Crown when the capture is complete.

[1] Southey's *Life of Nelson*, Chap. v.

[2] Southey, *op. cit.*, Chap. viii.

SO-CALLED STATE SERVITUDES

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In this article no attempt at an exhaustive examination of the origin and development of the doctrine of state servitudes will be made. The aim is rather to con ider the position of the doctrine in the light of the Award of the North Atlantic Coast Fisheries Tribunal in 1910 and of other recent events. In passing, however, it may be mentioned that traces of the terminology, if not of the conception, of servitudes in international relations occur even before Grotius,[1] but they do not receive much attention from him. While asserting the existence of a "right of harmless use" (*jus utilitatis innoxiae*) and illustrating it by means of instances of a natural "right of transit," [2] he does not discuss the judicial nature of such rights when dependent on convention and makes no attempt to import into international law the civil law of servitudes.

I. North Atlantic Coast Fisheries Arbitration and later Incidents.

A. In the *North American Coast Fisheries Arbitration* the United States contended that "the liberties of fishery granted to the United States constitute an international servitude in their favour over the territory of Great Britain, thereby involving a derogation from the sovereignty of Great Britain, the servient state, and that therefore Great Britain is deprived, by reason of the grant, of its independent right to regulate the fishery." [3]

Senator Elihu Root in his argument mustered an impressive array of writers in favour of the existence of international servitudes

[1] See Nys, "Les prétendues servitudes internationales," *Revue de Droit international et Législation comparée*, 2nd series, XIII (1911), p. 314, who mentions (p. 320) a deed of grant of an international character occurring in 1281, called *Instrumentum juris aperturae* and containing the expression *tale jus seu servitutem constituo.*

[2] *De Jure Belli ac Pacis*, Lib. II, cap. II, §§ XI *et seq.* See also Lib. I, cap. I, § 4.

[3] *Fisheries Arbitration Argument of Elihu Root*, ed. J. B. Scott (World Peace Foundation, 1912), p. 495.

and distilled from them what he regards as the essential quality of servitudes, namely " an independent state limiting its sovereignty . . . so as to permit, and permanently permit, another state itself or through its citizens to have the beneficial use of the territory of the state that limits its sovereignty." [1] He attached no importance to the use of the word servitude and, preferring to call the right a burden, put his contention in this form : " The sovereign of the burdened territory shall not hamper the possessor of the right that constitutes the burden in the exercise of that right, or lessen the right by various dispositions." [2] The essence of his contention is that this kind of right is a sovereign right in itself and that its possessor is, within the limits of the treaty conferring it, free and independent of the sovereignty of the servient state.

The Tribunal, while accepting the American contention that the grant of an international servitude involves a derogation from the sovereignty of the grantor state, declined to regard the grant in question as constituting a servitude for reasons the most important of which for our present purposes may be summarized as follows : (*a*) because there was not sufficient evidence that British or American statesmen in 1818 were conversant with the doctrine of international servitudes ; (*b*) because an international servitude involves the express grant of a sovereign right and an analogy of a *praedium dominans* and a *praedium serviens*, whereas the liberty to fish granted by the treaty of 1818 is not a sovereign right but a purely economic right ; (*c*) because the doctrine of international servitudes in the sense attributed to it in the American argument " originated in the peculiar and now obsolete conditions prevailing in the Holy Roman Empire of which the *domini terrae* were not fully sovereigns " and " being but little suited to the principle of sovereignty which prevails in states under a system of constitutional government such as Great Britain and the United States, and to the present international relations of sovereign states, has found little, if any, support from modern publicists." [3]

For the purposes of this arbitration the question of international servitudes was fully examined by the legal advisers of Great Britain and the United States—particularly the American counsel,

[1] *Fisheries Arbitration Argument of Elihu Root*, ed. J. B. Scott (World Peace Foundation, 1912), p. 247. [2] *Ibid.*, p. 248.

[3] The statement subsequently made by the President of the Tribunal, Dr. Lammasch, in a published article that the Award " contained elements of a compromise," does not relate to this legal question, and was later explained by him (*American Journal of International Law*, Vol. VI (1912), p. 178).

an important part of whose argument rested on the doctrine, and the results of this examination will be found in the printed and oral Arguments of the two parties. A summary of the American argument will be found on pages lxxxii to xciv and 239 to 255 of the volume edited by Professor J. B. Scott, which has already been cited. It is therefore unnecessary for the purposes of this short article to travel once more the ground covered by these researches, and I shall confine my remarks in the main to certain developments and illustrations of the doctrine since the Fisheries Arbitration of 1910.

B. *The Dutch Mining Case.* In 1914 the Supreme Court of Cologne had to consider a case [1] in which an owner of houses in German territory which were damaged by the working of a mine sued the lessee of the mine, who held his lease from the Dutch Government. The ownership of the mine was vested in that Government by virtue of the following provisions of a Prusso-Netherlandish boundary treaty of 1816:

"The cession of the K. and R. parts [to Prussia] resulting from the preceding article shall cause no damage or disadvantage to the exploitation of the coal mine. Formerly this mine belonged to the Abbey of R. and in the K. and R. districts it is now being continued for the account of the Dutch Government, in such manner, that this government or, in its place, the lawful owner, retains the authority to carry on in the ceded parts works serviceable for the mining of coal or for drainage purposes. Neither under the pretext of instructions issued to its engineers, nor by imposts or other burdens, may the Government of Prussia interfere with or restrict the mining of coal or the bringing of the coal mined to the surface, nor may it place any hindrance in the way of its being marketed."

The case raised the question "whether the interest which the Dutch Government had in the mine was to be considered as a mere concession, in which case it would be subject to Prussian law, or whether it was to be regarded as an international servitude, in which case it was contended that it would not be subject to the Prussian law." The Court adopted the latter view and held that the treaty provisions involved

"the exclusion of certain sovereign rights in the ceded parts resulting from the territorial sovereignty. In so far as the right to mine coal and other minerals contained in this coal-field comes into question, part of this territorial sovereignty remains with Holland. Because of this fact, a sort of international servitude has arisen by which Holland is as a state entitled, now as previously, in the matter of this mine to exercise its own legislative authority and police supervision; that is,

[1] *American Journal of International Law*, Vol. VIII (1914), pp. 858 and 907.

it has real sovereign rights with respect to the object situated within the territory of the foreign state." [1]

C. *The Aäland Islands Question.* In 1920 the attention of the Council of the League of Nations having been called under Article 11 of the Covenant to the existence of a dispute between Sweden and Finland threatening " to disturb international peace or the good understanding between nations upon which peace depends," the Council appointed an International Committee of Jurists to report to it (*inter alia*) upon " the present position with regard to international obligations concerning the demilitarization of the Aäland Islands." In a Convention of March 30, 1856, made between France, Great Britain and Russia, and annexed to and forming part of the General Treaty of Peace of 1856, Russia declared at the request of France and Great Britain " that the Aäland Islands shall not be fortified, and that no military or naval base shall be maintained or created there." Sweden was not a party to that Convention or to the General Treaty of Peace. It was argued by Sweden before the Committee of Jurists appointed by the Council of the League that " the Convention of 1856 definitely created a real servitude attaching to the territory of the Aäland Islands," so that it was equally binding on Finland as the successor to the sovereign rights of Russia in those Islands. The Committee of Jurists (Professor F. Larnaude, A. Struycken, and Max Huber), while stating that " the existence of international servitudes, in the true technical sense of the term, is not generally admitted," and referring to the North Atlantic Coast Fisheries Award, were able to maintain the duty of demilitarization by following a different line of argument. Sweden was neither a party to nor mentioned in the Convention of 1856, but the Jurists held that the Convention created " true objective law," was a part of " European law," and bore " the character of a settlement regulating European interests," so that Sweden " by reason of the objective nature of the settlement " of 1856 could " as a Power directly interested, insist upon compliance with the provisions [of the Convention of 1856] in so far as the contracting parties have not cancelled it." Accordingly, the conclusion of the Jurists on this head was as follows :

" The provisions [as to demilitarization] were laid down in European interests. They constituted a special international status relating to military considerations for the Aäland Islands. It follows that until these provisions are

[1] *American Journal of International Law*, Vol. VIII (1914), p. 909.

duly replaced by others, every State interested has the right to insist upon compliance with them. It also follows that any State in possession of the Islands must conform to the obligations, binding upon it, arising out of the system of demilitarization established by these provisions."

D. *The Wimbledon* in the Permanent Court of International Justice in 1923 arose upon Article 380 of the Treaty of Versailles :

" The Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality."

The question at issue briefly was, whether Germany was entitled to deny passage through the Kiel Canal to a British steamer laden with munitions for Poland then at war (or for the purposes of the decision assumed to be still at war) with Russia, Germany being neutral and contending that to have permitted passage would have involved her in a breach of neutrality. It was argued for Germany that the right created by Article 380 was a servitude by international law and must therefore be construed " as restrictively as possible and confined within its narrowest limits," more especially so as not to involve a breach of neutrality. The majority of the Court considered that they were " not called upon to take a definite attitude with regard to the question, which is moreover of a very controversial nature, whether in the domain of international law there really exist servitudes analogous to the servitudes of private law," and expressed the opinion that whether the obligation upon Germany was a servitude or purely contractual it must be restrictively interposed (as being a limitation upon sovereign rights) but not so restrictively as was contended by Germany, against whom upon this and other grounds they gave judgment. Professor Schücking, on the other hand, in a dissenting judgment expressed the opinion that

" The right to free passage through the Kiel Canal . . . undoubtedly assumes the form of a *servitus juris publici voluntaria.* This conception, which for centuries has proved extremely useful in international law, is, it is true, at the present time the subject of controversy amongst writers on international law, but its importance has in fact been increased by the peace Treaties following the World War. For in these treaties many legal situations have been created which can be placed in no other category than that of servitudes in international law."

The consequence which he deduced from the classification of the right as a servitude, was, the liability to (i) the rule of restrictive interpretation above mentioned, and (ii) the rule that " the states benefiting by the servitude are under the obligation *civiliter uti*

as regards the state under servitude." By the application of these rules, in his opinion, the exercise of the servitude was subject to the limitations imposed by exigencies of Germany's neutrality and of her highly critical internal political situation.

The Wimbledon contains indications of the same line of reasoning as was noticed in the Report of the Jurists in the Aäland Islands case. If we may paraphrase the relevant part of the opinion of the majority of the Court in *The Wimbledon*, it is this : " We don't care whether this is a servitude or not. Its effect is to dedicate the canal to the use of the whole world, so that it has become an international waterway intended to provide under treaty guarantee easier access to the Baltic for the benefit of all nations of the world. Its new régime has become part of the public law of Europe, if not of the world. Hence the fact that Russia is not a party to the Treaty of Versailles is immaterial." In other words, it is apparent that some, if not all, of the consequences which would follow upon holding that an international servitude has been created, can be obtained by holding in the alternative that the right created is part of the public law of Europe or of the world. In fact, look at it which way you will, rights of this character have a certain " reality " about them ; they are not purely contractual rights *in personam*.

E. *Saar Basin.* Section 22 of the Annex to Articles 45 to 50 of the Treaty of Versailles provides as follows :

" Persons, goods, vessels, carriages, wagons and mails coming from or going to the Saar Basin shall enjoy all the rights and privileges relating to transit and transport which are specified in the provisions of Part XII (Ports, Waterways and Railways) of the present Treaty."

By Article 321 of Part XII :

" Germany undertakes to grant freedom of transit through her territories on the routes most convenient for international transit either by rail, navigable waterway, or canal, to persons, goods, vessels, carriages, wagons, and mails coming from or going to the territories of any of the Allied and Associated Powers whether contiguous or not . . ."

In November, 1923, a popular body called " the Parties of the Advisory Council of the Saar Territory " petitioned the Council of the League of Nations, alleging that the enjoyment of the right of passage through German territory to such a place as Geneva, for instance, was being denied to certain of the Saar inhabitants by the officers of the Inter-Allied Rhineland High Commission, the Saar Basin being surrounded on the one side by France, on the other by

German Occupied Territory. Apart from the political issues involved, at least one point of legal importance seemed to arise. Does this right of passage through German territory avail against an authority which has come lawfully into the control of the relevant portions of German territory, as did the Inter-Allied Rhineland High Commission as the result of the Rhineland Agreement of June 28, 1919 ? Is the right only a personal one against the German Republic or does it inhere in German territory ? The legal advisers of the Saar Political Parties, in the opinion submitted in support of the Petition, drew attention to the " real " nature of the right of transit and pointed, as a means of reconciling the exercises of that right with the exercise of the right and duty of the Rhineland Commission to " secure the maintenance, safety and requirements " of the Allied troops, to a solution adopted in two treaties for the regulation of rights of passage which provided that passengers and their baggage should travel in what are virtually sealed wagons, not to be opened during transit, over the territory burdened with the rights of passage. These treaties are (i) that of April 21, 1921, between Germany, Poland, and the Free City of Danzig, made in pursuance of Articles 89 and 98 of the Treaty of Versailles, according freedom of transit between East Prussia and the rest of Germany across the Polish corridor, and (ii) the " Dispositions relatives à la Voie Ferrée de Raeren à Kalterherberg," drawn up by the Commission de Délimitation des Frontières Germano-Belges and signed on November 6, 1920.

No judicial answer to the legal questions above mentioned was ever given, as the Rhineland Commission in February, 1924 (the petition being due for consideration by the Council of the League in March, 1924), rescinded their " embargo " on the Saar politicians and, adopting the solution referred to above, granted them the right to pass through the Occupied Territory to other parts of unoccupied Germany on condition that they do not leave the railway stations in the Occupied Territory.

F. *The Treaty of Versailles* affords some more illustrations of rights having a " real " character, whose true juridical nature may some day come into question ; for instance Articles 42 and 43 (demilitarization), Articles 89 and 98 (previously referred to), Article 104 (Poland's right of importation and exportation through the Free City of Danzig),[1] Article 115 (demilitarization of Heligo-

[1] Upon the effect of the exercise of this right by Poland in time of war upon the neutrality of Danzig, see de Staël-Holstein, *Revue de Droit International et Législation comparée*, 3rd series, II (1922), p. 428.

land), Parts V (Military, Naval and Air Clauses), XI (Aerial Navigation), and XII (Ports, Waterways and Railways) *passim*.

These instances of rights in the nature of servitudes created by recent treaties are mentioned in order to show that the question under discussion is not a purely academic one. Rights of this character are being created every year, and, as there must be hundreds of them in existence, it is the duty of international lawyers to examine their juridical nature and assign to them their appropriate place in the jurisprudence of international law.

G. *Inter-cantonal servitudes in Switzerland.* Attention may here be drawn to a recent article on this subject. Disputes between the Swiss cantons are decided primarily by the application of rules of law drawn from the Federal Constitution and Federal legislation. In default of any relevant rule obtainable from these sources, resort is had to the rules of international law, so that Swiss Federal decisions sometimes afford evidence of the opinions of Swiss judges upon questions of international law. Several cases have occurred in which the Federal Court have accepted the conception of state servitudes in the territorial relations between cantons as a matter well established " in public law." [1]

II. Opinions of Text-Writers.

The condemnation of the doctrine by the North Atlantic Coast Fisheries Tribunal has produced singularly little effect upon writers who had already formed views on the subject, as will appear from the following citations from a few typical works.

Fauchille [2] regards it as an exaggeration to say that the Tribunal condemned the doctrine :

" La sentence ne dit pas que la notion de servitude internationale soit incompatible avec l'idée qu'on se fait actuellement de la souveraineté ; elle se borne à déclarer qu'elle est ' peu en harmonie ' avec cette idée, et la conséquence qu'elle en tire est que l'existence d'une telle servitude ne peut être admise que sur la base d'une preuve décisive."

While denying the existence of natural servitudes such as the duty of not interfering with the course of a " bi-national " river, which he regards as normal limitations upon sovereign rights arising from the very nature of the case, he gives a large number

[1] Schindler, " The Administration of Justice in the Swiss Federal Court in International Disputes," *American Journal of International Law*, Vol. XV (1921), pp. 149, 174.

[2] *Droit International Public, I. Paix* (1922), § 339.

of illustrations of conventional servitudes created both before and since the decision of the Tribunal, including some created by the Treaty of Versailles.

Von Liszt maintains his opposition to the conception of state servitudes.[1] His argument on the matter I find difficult to follow, but I understand it to be that while in no circumstances can the conception of state servitudes be accepted, nevertheless when, and only when, the restriction imposed by treaty is created, not in the exclusive interest of the other contracting party but in the general interest as, for instance, in a collective treaty, then its obligation assumes a real character and binds the territory in the hands of a state acquiring it.

Hall[2] was never enthusiastic on the subject of servitudes, and the learned editor of the eighth edition in a note comments upon the "growing tendency to deny the term servitude to the numerous restrictions on sovereignty to which states had in many cases subjected themselves by treaty. . . ."

Oppenheim,[3] who defines state servitudes as "those exceptional restrictions made by treaty on the territorial supremacy of a state by which a part or the whole of its territory is in a limited way made perpetually to serve a certain purpose or interest of another state," considered that "it is hardly to be expected that [the opinion of the Fisheries Tribunal] will induce theory and practice to drop the conception of state servitudes, which is of great value," and strongly attacks the American contention adopted by the Tribunal that a servitude predicates an express grant of a sovereign right. The same writer in another passage, which has no connexion with servitudes, makes some observations upon the effect upon international law of the Roman law of the acquisition of private property which are very illuminating. The passage[4] should be read in full but may be summarized as follows: at the time of Grotius, state territory was still more or less identified with the private property of its ruler; hence the rules of Roman law as to private property seemed relevant. Every analogy to private property having now disappeared from the conception of state territory, these rules are inapplicable, but they have left traces which can hardly be obliterated. Now, however, modern

[1] *Das Völkerrecht*, 11th ed. (1918), pp. 70 and 152.

[2] 8th ed. by Professor A. Pearce Higgins, p. 204.

[3] *International Law*, 2nd ed. (1912), Vol. I, Peace, § 203; also 3rd ed. by R. F. Roxburgh (1920), § 203.

[4] *Ibid.* (1920), § 210.

international law must draw its rules from the " real practice " of states, although " the terminology and common-sense basis " of Roman law may be useful. This passage might almost have been written by the North Atlantic Coast Fisheries Arbitrators and supports their observations upon the obsolescence of the doctrine of state servitudes already referred to.[1]

Pitt Cobbett,[2] having regard to the fact that states can and do grant to one another rights of using or of restraining the use of territory, and " to the fact that such grants . . . do create real rights," sees no reason why they should not be regarded as servitudes.

Fenwick [3] accepts the existence of international servitudes, while recognizing that " there is still no general agreement as to the restrictions that may properly be designated as servitudes, or as to the character of the limitations they impose upon the state subject to them," and uses the term so extensively as to comprise an unusual form of negative servitude, of a political rather than a legal character, which is imposed by the United States upon the smaller states of the American continent in pursuance of the Monroe Doctrine, namely an obligation not to " cede a portion of their territory to a European or Asiatic power or permit such power to obtain political control over it."

On the other hand, Hyde, whose work appeared in 1922, after referring to the North Atlantic Coast Fisheries Arbitration, says in discussing the term " servitude " : [4]

" Its use is believed to obscure rather than clarify the perception of what takes place when contracting States undertake to burden territory with restrictions in favour of a non-territorial Sovereign. In case of controversy concerning the nature and scope of a restriction the precise question is likely to be first, whether the limitation of control imposed by the treaty is permanent in character, applicable for all time to the area concerned, regardless of changes of sovereignty which it may undergo ; and secondly, whether the arrangement serves to clothe a foreign grantee with privileges that are more than economic, embracing, for example, rights of political control. The solution of both questions depends upon the correct interpretation of the treaty involved. . . ."

And de Louter [5] emphatically condemns the doctrine of state servitudes and regards it as a mischievous relic of the early influence of Roman and feudal law.

[1] p. 112.

[2] *Leading Cases on International Law*, 4th ed. (1922), by Dr. H. H. L. Bellot, p. 114.

[3] *International Law*, by Charles G. Fenwick, London (1924), p. 284.

[4] *International Law*, Vol. I, p. 153.

[5] *Le droit international public positif* (1920), Vol. I, pp. 336–9.

Niemeyer [1] regards the attempt to liken restrictions upon territorial sovereignty created by treaty to the servitudes of private law as worthless and misleading, and considers that each restriction of this kind must be considered individually and in the light of the special circumstances of its creation. The term "state servitudes" is, in his opinion, only innocuous if it is realized that their only point of resemblance to the servitudes of private law is that they create a territorial restriction upon the sovereignty of the state, and that state servitudes do not necessarily or even usually create rights *in rem*.

III. The Public Law Theory.

It cannot be denied that at least two of the three recent judicial or semi-judicial examinations of the doctrine of state servitudes—the North Atlantic Coast Fisheries and the Aäland Islands—have damaged the doctrine, but to say, as some writers have said, that they have condemned it to death is perhaps to go too far. At any rate it will die hard in countries whose legal systems are based upon the civil law. It seems nearer to reality to say that international law recognizes the capacity of creating by treaty certain territorial restrictions which differ from the ordinary personal obligations resulting from a treaty between two states, and that it is engaged in building up a body of rules for the regulation of this kind of obligation. It is inclined to reject the offer made by text-writers of a ready-made set of rules borrowed from the civil law of servitudes, but there can be no doubt that it will seek and find inspiration and guidance in the civil law in this as in other matters. Its cautious reluctance to accept the civil law of servitudes "lock, stock and barrel" is probably justified by the difference between *dominium* and *imperium*. So long as international law is based upon state sovereignty, the analogy between *dominium* and *imperium* is insecure, so long also it will be dangerous to argue, as advocates of the doctrine under discussion do, that an obligation of the class which in private law operates to derogate from the *dominium* of the grantor by conferring one or some of the usual rights of a *dominus* upon the grantee, must when it occurs between states impair the *imperium* of the grantor sovereign by conferring some portion of his sovereignty upon the grantee. States are very sensitive—hyper-sensitive—on the question of sovereignty, and

[1] *Völkerrecht* (1923), p. 104.

the very word "servitude" has an ugly sound in the ear of a sovereign state's legal adviser or representative. That international law can usefully borrow from the conceptions of private law without importing its terminology or a complete set of rules is manifest in more matters than one. Most treaties or conventions between states are jurisprudentially contracts, and the private law of contract has proved an important source of the rules for their formation, interpretation, and dissolution. But treaties or conventions are not usually called contracts, and any attempt to apply to them the complete system of the law of contract would be disastrous. For instance, the rules as to duress in the two spheres are as different as they could well be, and the *clausula rebus sic stantibus*, though having certain analogies in the Anglo-American rules regarding supervening impossibility,[1] would have a devastating effect in the common law of contracts.

And in the two instances just mentioned as in the case of servitudes may it not be that the true danger of the analogous application of rules of private law to the relations of states lies in the existence of the doctrine of state sovereignty? Private law postulates the existence of a common superior, whereas international law makes a contrary assumption and recognizes the existence of a sphere in which each state is sovereign and master of its own destiny except in so far as it may be coerced by external force.

The new feature which seems to be emerging is this. While in general it is true that *pacta tertiis nec nocent nec prosunt*, this maxim has certain qualifications, and, in particular, two classes of treaties have a law-creating effect beyond the immediate parties to them which is recognized though not yet well defined: (*a*) the first class consists of treaties which form part of an international settlement such as the treaties resulting from the Congress of Vienna in 1815, the Treaty of Paris, 1856, and the treaties of peace which concluded the World War;[2] (*b*) the second consists of treaties which regulate the dedication to the world of some new facility for transit or transport such as a new canal or the right of navigation upon a river formerly closed. "It frequently happens that a treaty becomes the basis of a rule of customary law, because all the states which are concerned in its stipulations have come to conform habitually

[1] See an article by the present writer entitled *War-time Impossibility of Performance of Contract*, L. Q. R. XXXV. 84, reprinted in *Legal Effects of War*, Cambridge, 1920.

[2] Roxburgh, *International Conventions and Third States.*

with them under the conviction that they are legally bound to do so. In this case third states acquire rights and incur obligations which were originally conferred and imposed by treaty, but have come to be conferred and imposed by a rule of law." [1]

The main object of the champions of state servitudes in asserting that doctrine is, so far as I can see, to establish for the territorial restrictions to which they give that name a sphere of operation wider than they would receive as treaty obligations of a personal character governed by the maxim *pacta tertiis*, &c. In fact, the object is to make them bind third parties into whose hands the so-called dominant or servient territories may come. I submit that the advocates of this theory have not made good their contention. To enumerate a list of territorial restrictions and to call them servitudes proves nothing at all. To pick out a very few of them and to point out that in spite of changes of territory they continue to survive and to be recognized as restrictions proves next to nothing, unless it is further shown (*a*) that this result is purely automatic and happens because the creation of the right confers a fragment of *imperium* or at least *dominium* upon the party entitled, and (*b*) that there are no subsequent treaties between the new parties recognizing or renewing the restrictions other than treaties purely declaratory of the continuance of the restrictions which would survive without them.

A brief analysis of the instances of the permanence of so-called servitudes demonstrates, I submit, that their champions are unable to produce this evidence.

It is believed that most, if not all, of the cases in which a so-called servitude has not been merely asserted by text-writers to have a "real" character but has actually met and successfully survived the test of a change of sovereignty over the dominant or the servient territory can upon analysis be assigned to one of these two classes of treaties (*a*) and (*b*) above mentioned. Although the list of servitudes given by the text-writers who accept the doctrine is a long one, the occasions on which their "real" character is put to the test are few, and the instances cited are not numerous. Let us examine some of them. (i) The duty to demilitarize and keep demilitarized the Aäland Islands has, as we have seen,[2] survived (but not automatically) a change of sovereignty

[1] *Op. cit.*, p. 112. Mr. Roxburgh confined these remarks to treaties of class (*a*) above, but it is submitted that they are equally relevant to my class (*b*). See Oppenheim, *Panama Canal Conflict*, p. 47.

[2] See p. 114.

in the dominant territory, and having been created by the Treaty of Paris, 1856, can be assigned to class (*a*) above mentioned.

(ii) The duty not to fortify the Alsatian town of Hüningen assumed by France by the Treaty of Paris, 1815,[1] in favour of the Swiss canton of Basle survived, so Oppenheim asserts, the cession of Alsace to the German Empire by the Treaty of Frankfort, 1871, and its cession by the German Empire to France by the Treaty of Versailles, 1919.[2] Fleiner, a Swiss professor, makes a similar assertion.[3] In both cases the assertion, the truth of which I am not doubting, appears to be an inference from the fact that the so-called servitude is not mentioned either in the Treaty of Frankfort or the Treaty of Versailles. (Westlake[4] says that in 1848 the French Provisional Government declared the obligation to be no longer binding.)

(iii) By Article XCII of the Congress Treaty of Vienna, 1815, the provinces of Chablais and Faucigny and the part of Savoy north of the Ugine, all of which then belonged to the King of Sardinia, were declared to "form part of the neutrality of Switzerland, as it is recognized and guaranteed by the Powers."[5] The champions of servitudes differ on the question whether the neutralization of a part of a state's territory is a servitude or not. Westlake[6] describes the arrangement above mentioned as a "servitude of neutrality in support of the neutrality of Switzerland," and regards the treaty provision creating it as "dispositive," that is, as definitely creating a body of rights which remain in existence independently of any control between the parties to the original treaty. Accordingly, he regards the neutralization as obligatory on France, to whom these territories were ceded by Sardinia in 1860. France, by Article II of the Treaty of Turin of 1860,[7] definitely accepted the territories from Sardinia, subject to the conditions of their neutralization upon which Sardinia held them, and in a subsequent note addressed to the British Government on June 20, 1860,[8] asserted her desire to carry out this arrangement "by diplomatic stipulation destined to a place in the law of Europe."

[1] Hertslet, *Map of Europe by Treaty*, p. 340.
[2] Oppenheim, *op. cit.*, Vol. I, p. 207.
[3] *Schweizerisches Bundesstaatsrecht*, pp. 716, 717.
[4] *International Law*, Vol. I (2nd ed.), p. 296.
[5] Hertslet, *op. cit.*, p. 262. Rougier in *Revue Générale de Droit international public*, 2nd series, Tome. II, Tome XXVII (1920), p. 40.
[6] *Op. cit.*, Vol. I (2nd ed.), p. 61.
[7] Hertslet, *op. cit*, p. 1430.
[8] *Ibid.*, *op. cit.*, p. 1448.

So far, however, as I am aware, no such arrangement was carried out, and Clauss,[1] writing in 1894, makes a similar statement.[2]

(iv) A right of passage through Savoy was granted by the King of Sardinia to Switzerland by a treaty of March, 1815,[3] and when Savoy was ceded by Sardinia to France in 1860, both France and Sardinia put on record (Art. II of Treaty of Turin of 1860) that Sardinia could not transfer the neutralized parts of Savoy "except on the conditions upon which [Sardinia] possesses them"[4]—an expression which presumably includes the right of passage as well as the condition of neutralization.

All the four instances given rest upon instruments which can, I think, fairly be described as forming part of the public law of Europe, and, in particular, any treaty provision connected with the permanent neutralization of Switzerland partakes of this nature. Westlake[5] speaks of "the Swiss, and European because Swiss, interest secured by the neutrality of northern Savoy."

(v) Baron de Staël-Holstein in a very valuable article on *La Doctrine des Servitudes et son Application en Scandinavie*[6] mentions a large number of so-called servitudes but not many cases of actual survival upon changes of sovereignty. One at least may be cited—the obligation assumed by Sweden by the Treaty of Stockholm of 1720 not to fortify Wismar. When Sweden pledged Wismar to the Duke of Mecklenburg-Schwerin in 1803 the Duke, by this treaty containing the pledge, expressly acknowledged himself bound by the obligation during the period of the pledge. The final treaty of cession in 1903, when Sweden declined to exercise her right of redemption, contained no such provision. This instance merely shows that Sweden had the prudence to obtain an express acknowledgement of the obligations from the pledgee.

[1] *Die Lehre von den Staatsdienstbarkeiten*, pp. 13, 14. See also Fleiner, *op. cit.*, who discusses this case at p. 715.

[2] Now, see Art. 435 of the Treaty of Versailles, 1919.

[3] Cited by Hall, *op. cit.*, p. 204 (n.); G. E. Sherman, "The Neutrality of Switzerland," *American Journal of International Law*, Vol. XII (1918), p. 462; Text in Hertslet, *op. cit.*, p. 71.

[4] Hertslet, *op. cit.*, p. 1430.

[5] *Op. cit.*, Vol. I (2nd ed.), p. 61. See also at p. 297. "By these articles (mentioned above) a servitude or easement was created in certain districts of Savoy, as a part of a system of permanent neutrality created for the benefit of all Europe, and a power affected by that servitude can no more by its own determination put an end to what is recognized as a part of the system than it could to the whole."

[6] *Revue de Droit International et de Législation comparée*, 3rd series, III (1922), pp. 424, 452.

IV. Conclusion.

We may summarize our estimate of the present position in international law of the conventional restrictions on territory which have been likened by many writers to the servitudes of private law as follows :

(*a*) International law recognizes the existence of conventional restrictions upon territory which differ in juridical nature from the obligations *in personam* normally created by a treaty.

(*b*) The main guide as to the juridical nature of any particular obligation must be the intention of the parties to the instrument creating it. Did they intend it to be permanent, objective, and irrespective of changes of sovereignty, or did they intend it to endure only while the burdened and the benefiting territories remained under the same sovereignties ?

(*c*) When the treaty creating the restriction is of the nature of an International Settlement or of a dedication *urbi et orbi* of some natural advantage or facility, the presumption is that the territorial restrictions created by it are intended to form part of the body of public international law. If indeed, as some would assert, they do not at once become so owing to a legislative virtue to be attributed to such treaties, they very soon become by tacit consent a part of customary international law and thereupon transcend the sphere of ordinary personal obligations.

(*d*) The attempt to apply to these restrictions the terminology and conceptions of the Roman law of servitudes is a legacy of a states system that has passed away and will probably do more harm than good.

APPENDIX

Some Publications in and since 1910.

Begriff und Wesen der Staatsservituten, by A. W. Hollatz, Berlin, 1910.

" The North Atlantic Coast Fisheries Arbitration," by Sir Erle Richards, *Journ. Soc. Comp. Leg.*, new series, XI (1910), p. 18.

" The Hague Award in the Atlantic Fisheries Arbitration," by J. E. Hogg, *Law Quarterly Review*, XXVI (1910), p. 415.

Des servitudes en droit international public, by P. Labrousse, Bordeaux, 1911.

" Les Prétendues Servitudes Internationales," by Ernest Nys in *Revue de Droit International et de Législation comparée*, XIII (1911), pp. 314–23.

" The Doctrine of Servitudes in International Law," by Pitman B. Potter, in *American Journal of International Law*, IX (1915), pp. 627–41.

" Le Traité de Versailles et la Neutralité de la Savoie," by Antoine Rougier, in *Revue Générale de Droit international public*, Tome XXVII (2nd series, Tome II), 1920, p. 40.

" La Question des Iles d'Aland," by Fernand de Visscher, in *Revue de Droit International et Législation comparée*, 3rd series, II (1921), pp. 35–56 and pp. 243–84.

" The Aäland Islands question," note by P. Marshall Brown in *A. J. I. L.* (1921), p. 271.

" La Doctrine des Servitudes internationales et son Application en Scandinavie," by Baron L. de Staël-Holstein, in *Revue de Droit International et de Législation comparée*, 3rd series, III (1922), p. 424.

Strupp's *Wörterbuch des Völkerrechts und der Diplomatie, sub tit.* Servituten (1925).

Other literature cited by Oppenheim, *op. cit.*, Vol. I (1920), § 203 ; Fauchille, *op. cit.*, Tome I, Paix (1922), § 339 ; and de Louter, *op. cit.*, Vol. I, p. 336 (n.).

IMMUNITIES OF STATE-OWNED SHIPS EMPLOYED IN COMMERCE

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THE acquisition through capture, requisition, or purchase by various governments, during or immediately following the close of the late war, of large numbers of merchant vessels and their employment, wholly or in part, as ordinary carriers of commerce has led to a stream of judicial decisions regarding the immunity of such vessels from actions brought in foreign courts to recover damages, to obtain payments for salvage services, for the enforcement of contracts between governments and charterers and similar claims. Some of the vessels thus acquired are, or were, operated directly by the governments possessing or controlling them; others, by private companies or individuals to whom they were chartered. Sometimes in the latter case they remained under the control of government naval officers and crews who were paid by the government. Some were employed exclusively in private trading; others in both private trading and transportation on account of the government. In some cases, especially during the war, the service to which they were put was that of carrying food supplies for the civil population, in which cases the service was claimed to be of a public character.

The best known case, prior to the outbreak of the late war, dealing with the question of the immunity of such vessels from legal process, was that of the *Parlement Belge* decided by the English Court of Appeal in 1880,[1] where it was held that a ship owned by and in the possession of the King of the Belgians in his capacity as the reigning sovereign of an independent state, manned by officers of the Belgian Navy and employed by him primarily as a mail packet but subsidiarily in the transportation of passengers and merchandise, did not lose its immunity from an action *in rem* by reason of such employment.

During the more than forty years that elapsed between the date of this decision and the outbreak of the World War the

[1] L. R., 5 P. D. 197.

question of the immunity of such vessels does not appear to have been again raised but once,[1] and the almost total non-employment by governments during this period of ships as ordinary carriers of commerce afforded few occasions for the practical application of a rule the merits of which otherwise would have been the subject of controversy, as they now are.

With the outbreak of the war and the acquisition by both belligerent and neutral governments, through the methods mentioned above, of extensive fleets of merchant vessels and their employment as commerce carriers, the question of immunity was at once raised before the courts in consequence of numerous attempts of private individuals to bring suits against them. One of the first, if not the first, of such cases was that of the *Athanasios*,[2] where the United States District Court for the Southern District of New York in 1915 dismissed a libel against a vessel under requisition by the Government of Greece, which was being employed for the transportation of grain on government account, although chartered to a private company. In the following year the United States District Court for the Eastern District of Pennsylvania held that a ship requisitioned by the Italian Government and being employed by it in the transportation of grain for the Italian Government was immune from suit in an Admiralty Court of the United States. The court relied upon the authority of the *Parlement Belge* and upon considerations of comity. The court declared that it was "far more important for citizens of the United States to recognize the rule of international comity that an independent sovereign cannot be personally sued . . . than it is to take cognizance of private rights, if by so doing that rule is violated."[3] A like decision was rendered (1917) by the United States District Court for the Eastern District of New York in the case of a damage suit brought against a vessel enrolled as a ship of the Argentine navy, flying the naval ensign, and manned and officered by enlisted men of the navy, but which was engaged in carrying to the United States a general cargo of merchandise belonging to private persons. The court emphasized the fact that the carrying of the cargo was rather an incident of the ship's voyage to the United

[1] The case of the *Jussy* (1906) P. 270, where the Court of Appeal held that an Admiralty action *in rem* for damages was not allowable against a vessel owned by the State of Roumania and employed by it in connexion with the national railways.

[2] 228 *Fed. Rep.* 558.

[3] The *Luigi*, 230 *Fed. Rep.* 493.

States to obtain coal and munitions for the Argentine Government.[1] The same conclusion was reached in 1919 by the United States Circuit Court of Appeals in the case of a vessel owned by the Italian Government and employed by it in the general carrying trade.[2] However, in the case of a vessel which had been requisitioned by the Italian Government and which was being employed by it as a carrier of commerce, but which remained under the control and management of its owner, who employed and paid its officers and crew, the United States Circuit Court of Appeals held in 1916 that it was not entitled to immunity from a suit *in rem* for a maritime tort.[3]

The court took occasion to say that there were

> " many reasons which suggest the inexpediency and impolicy of creating a class of vessels for which no one is in any way responsible. . . . For torts and contracts of an ordinary vessel, it and its owners are liable, but the ship in this case, and there are now apparently thousands like it, is operated by its owners, and for its actions no government is responsible at law or in morals." The court further observed that : " immunity to public vessels, diplomatic representatives, and, under certain circumstances, to other government property in its possession and control could be safely accorded because the limited and ordinary responsibilities of diplomats or agents in charge of property, make abuse of the immunity rare. But there is no such guarantee for the conduct of the thousands of persons privately employed upon ships who happen at the time by contract or requisition to be under charter to foreign governments."

But in the similar case of a vessel under requisition by the British Government and employed in the carrying of cargo " for public use," but which, like the *Attualita*, was operated by its owners, commanded by its officers, and manned by its crew who continued in control after requisition, the United States District Court for the District of New Jersey (1918) held that it was entitled to immunity from legal process, for the reason that the owners who operated it and the officers and crew who manned it were the " instrumentalities " of the sovereign.[4] The only difference between this case and that of the *Attualita* was that at the time the decisions were rendered the British Government was a co-belligerent of the United States, whereas the Italian Government was not.

The fact is, the American courts have shown a disposition to interpret rather strictly the rule of immunity in the case of

[1] The *Pampa*, 245 *Fed. Rep.* 137.
[2] The *Carlo Poma*, 259 *Fed. Rep.* 369.
[3] The *Attualita*, 238 *Fed. Rep.* 909.
[4] The *Roseric*, 254 *Fed. Rep.* 154.

vessels owned or controlled by the Italian Government, for the reason that the Italian courts do not hesitate to take jurisdiction of suits against government ships employed in ordinary commerce. In the case of the *Pesaro* [1] Judge Mack of the United States District Court for the Southern District of New York held in 1921 that a steamship owned and operated by the Italian Government, but which was not enrolled as a naval vessel or officered by naval officers and which was employed as an ordinary merchant vessel in carrying passengers and cargo for hire, was not exempt from arrest or process from the Admiralty Courts of the United States, especially in view of the fact that the vessel was not entitled to such immunity from the courts of Italy, and because of the further fact that no request had been made through the official channels of the Government of the United States for exemption. Judge Mack wrote a learned opinion in which he criticized the extension of the rule of immunity to government ships employed in ordinary commerce, and after a full examination of the authorities and the jurisprudence of other countries, concluded that " it is certain that the exercise of jurisdiction by the courts in the case of public merchantmen cannot to-day be considered novel or revolutionary."

A case involving the question of the immunity of a naval transport owned by the Government of Chile and in its possession through a naval captain and crew, the former acting as the master, but which was under charter to a private individual to carry a commercial cargo was that of the *Maipo*.[2] The officers and crew were paid by the Chilean Government, and, as in the case of the *Pampa*, the vessel was carrying a cargo to the United States for a private firm but was to take back a cargo belonging to the government. A suit having been brought against the vessel by the shipper for damages to the cargo, the United States District Court for the Southern District of New York held that it had no jurisdiction. Judge Mayer adverting to the " practical considerations of comity " which he thought could not be lost sight of, took occasion to observe that the vessels of the United Shipping Board might soon find themselves claiming a similar immunity.

" It would not be surprising," he added, " if at no distant date large numbers of vessels setting out for various ports of various countries will be manned as

[1] 277 *Fed. Rep.* 473.

[2] 252 *Fed. Rep.* 627 (1918).

government vessels for the very purpose of assuring quick clearance and freedom from process. If our own people lose by recognizing the immunity of other government vessels, that is the price which individuals must pay for the ultimate benefit to their country."

In a subsequent hearing of the case [1] Judge Hough came to the same conclusion. Referring to the "enormous extension of sovereign privilege demanded by vessels in all kinds of business, of late months and years," he declared that it did not indicate any change or advance in the law relative to the immunities of government-owned ships; it only indicated a change of view on the part of governments regarding public duties and enterprises. The law, he said, remained the same and it was not for the courts to say that when a government acquires and operates merchant vessels in commerce it should be subject to the same liabilities as private common carriers. If a government engages in such business and considers it to be a "governmental function," that is a matter which concerns it alone. If other governments do not wish to recognize the immunities that have always been accorded to government vessels it is for them to say so through the diplomatic channels. In brief, it is a diplomatic and not a judicial question.

The above-mentioned decisions were those of inferior Federal courts of the United States. In all the cases, except two, the immunity from judicial process was sustained. The Supreme Court has not had occasion to pass on the question, but there is little doubt that like the inferior courts it would take a very broad view of the immunity and recognize it in such cases as those referred to above.

Naturally, the English courts have stood by the rule laid down in the case of the *Parlement Belge* and have even extended it to apply to vessels under requisition either by the British or foreign governments. In the case of the *Porto Alexandre* [2] the Court of Appeal in 1919 held that an action *in rem* for salvage would not lie against a vessel owned or requisitioned by the Portuguese Government and employed in the carrying trade. It was argued by counsel that a distinction should be made between ships employed by the state for public purposes and those engaged in trading, but the court, relying upon the decision in the *Parlement Belge*, refused to admit the validity of the distinction in so far as it related to exemption from legal

[1] 259 *Fed. Rep.* 367 (1919).

[2] L. R., 1920, 30.

process.[1] Lord Justice Scrutton, speaking for the Court of Appeal, admitted that the exemption from legal process of large numbers of government vessels, resulting from the wholesale nationalization of ships, which were being employed in ordinary trade, would undoubtedly cause great inconvenience to persons who had claims for damages, salvage, &c., against such vessels, but he thought the remedy was commercial or diplomatic and not judicial.

Judge Mayer's prophecy in the case of the *Maipo* (1918), that the vessels of the United States Shipping Board would in all probability be claiming at an early date the same immunity from the processes of foreign courts which the vessels of other governments were then claiming, soon came to be true. One of these ships, the *Ice King*, being arrested and made the object of an action for damages caused by a collision with a German ship, the Hamburg Superior Court (February 28, 1921) held that the vessel was exempt from legal process. The court observed that the distinction between government-owned ships employed for public purposes and those serving private purposes like ordinary trading vessels, had only recently come into existence and was not recognized by the rule of international law relating to the immunity of public vessels from legal process, which rule originated before the distinction had acquired any importance. The court raised the question, as the courts have frequently done in these recent cases, whether the withdrawal from the jurisdiction of foreign states of large fleets of vessels engaged in ordinary trade, such as that owned by the United States Shipping Board, had not created a situation which required international regulation. Such an alteration of the law, however, was, it asserted, a diplomatic or legislative function and not that of the judiciary. The decision of the Superior Court was affirmed by the Imperial Court in December, 1921.[2] The doctrine of absolute immunity was here enunciated and defended in strong language and was accorded to an enemy vessel, since Germany and the

[1] But in the *Broadmayne, Messicano, Erissos, Crimdon* and other cases referred to by Mr. A. D. MacNair in *The British Year Book of International Law* for 1921–2, pp. 70 ff., the English Courts held that actions *in rem* could be brought against requisitioned vessels in the possession and control of a sovereign state, but that proceedings with a view to their arrest or detention should be stayed, provided, apparently, they were being employed in the public service of such state.

[2] Evans, *Cases on International Law*, p. 259 ; and 33 *Rev. Int. du Droit Mar.* 868 ; German text in the *Hanseatische Gerichtszeitung*, 1921, p. 85. The decision is criticized in the same Journal by Dr. Brandis and defended by Dr. Stammann.

United States were still technically at war, no treaty of peace having yet been concluded. The extreme view here taken of the nature of the immunity was in accord with the traditional German doctrine as set forth in 1910 by the Prussian Tribunal of Conflicts in the *Anhalt* case.[1]

In 1921 the same question came before the Court of Sessions of Scotland in the case of the *Owners of S.S. Victoria* v. *the Owners of the Quillwark*.[2] The *Quillwark* was a vessel belonging to the United States Shipping Board against which an action was instituted for damages due to a collision. She was being employed as a merchant ship for purposes of commerce and was not manned by officers and men of the United States Navy. On the authority of the *Porto Alexandre* the court held that the ship was entitled to immunity from arrest and legal process. It observed that the inconvenience of granting immunity to state-owned ships employed in ordinary trading had been pointed out by English judges, but that circumstance had not prevented them from according it to such vessels.

Finally, in March, 1924, the English Court of Appeal reaffirmed the rule of immunity, in the case of *Compañía Mercantile Argentina* v. *United States Shipping Board*.[3] Here one of the Shipping Board vessels had been chartered to a Dutch company to carry a cargo of grain from Montevideo to Spanish ports and a dispute having arisen between the company and the Shipping Board in regard to the contract, an action was brought for a return of freight alleged to have been overpaid. The usual plea was put forward by the appellants that the rule of immunity did not apply to an action *in rem* against a state-owned vessel which was not being employed for a public purpose. On the authority of Wills J. in *Mighell* v. *Sultan of Johore* and of the decision of the Court of Appeal in the *Porto Alexandre*, the court held that a sovereign independent state does not by entering into a trade contract with a foreigner lose its immunity from process in foreign courts as regards matters arising out of the contract, nor does it, by making a submission to arbitration in a foreign country, lose its immunity from being impleaded in the courts of a foreign country. The United States Shipping Board, the owner of the vessel sued, was, the court pointed out, a department of the United States Government, administered by com-

[1] Eng. text in 5 *American Journal of International Law*, 490.
[2] 1 Scots Law Times, 65.
[3] 93 Law Journal Reports, 816.

missioners appointed by the President and was just as much a representative of the United States as an ambassador himself. Lord Justice Bankes concluded that "no authority was anywhere to be found that the mere engaging in some private trading business subjects him (the sovereign) to processes in the courts of a foreign country." In fact he said, the question of whether the vessel was employed in private trading did not arise, since the suit was in reality a proceeding *in personam*, against the United States Shipping Board and not an action against the ship. As to the argument that the defendants had waived their immunity by agreeing to arbitrate the dispute (an agreement which was subsequently refused), Lord Justice Bankes said it required a great deal more than a submission to arbitration to amount to a waiver by the sovereign of his immunity, when he is sued in a court of law *in personam*. The fact that the Shipping Board was willing, at any rate for a time, to proceed to arbitration did not touch the question of the waiver of immunity from process.

Had the suit been an action *in rem*, as the appellants argued that it was, the ship would clearly not have been entitled to immunity in view of a provision in the act of Congress of September 7, 1916, relating to the operation of vessels chartered or leased from the United States Shipping Board, to the effect that "such vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part." In fact, the United States District Court for the Southern District of New York, relying upon this provision refused immunity to one of the Shipping Board vessels which had been chartered to the French Government for the transportation of food supplies, which was manned by a French crew and was being employed as a merchant vessel.[1] See also the case of the *Lake Monroe*,[2] where the United States Supreme Court held that by virtue of the above-mentioned act of Congress a United States Shipping Board vessel which had been assigned to a private individual to be operated by him was subject to arrest and suit for damages caused by a collision, it being the intention of Congress "to subject such vessels to the same liabilities and duties as privately owned merchant vessels with which they compete." These cases afford the somewhat curious spectacle of an English court according

[1] 1918 The *Florence H.* 248, *Fed. Rep.* 1012.

[2] 250 U. S. 246.

immunity to the United States Shipping Board in connexion with a vessel chartered by it to a private Dutch concern, and an American court denying it to a ship chartered to the French Government and to another chartered to a private individual. Nevertheless, on the theory adopted by the English court that the suit was really against the Shipping Board rather than against the vessel, the claim of exemption in the English case rested on a different footing.

It is certain that the American Government never expected that the Shipping Board vessels would in all cases be accorded the usual immunities of public vessels, and the Suits Admiralty Act of 1920, assuming that some of them would be made the object of arrest and suit, provided that the government might claim exemption for them in particular cases or execute a bond for their release or enter appearance and pledge the credit of the United States for the payment of any judgments entered against them by foreign courts (Secs. 7–8). And the Secretary of State on August 2, 1921, replying to an inquiry on the subject, stated that it was "the view of the Department that government-owned vessels or vessels under requisition, employed in commerce, should not be regarded as entitled to the immunities of war vessels," and it was added that the Department "has not claimed such immunities."

It may be further remarked that in April, 1924, shortly after the decision of the English Court of Appeal referred to above, the American Government instructed its diplomatic representatives abroad to notify the governments to which they were accredited that "the United States will not claim that ships operated by or on behalf of the United States Shipping Board, when engaged in commercial pursuits, are entitled to immunity from arrest or to other special advantages which are generally accorded the public vessels of a foreign nation. Such ships when so operated will be permitted to be subject to the laws of foreign countries which apply under otherwise like conditions, to privately owned merchant ships foreign to such countries." The instruction, however, stated that the United States reserved the right under the Suits Admiralty Act of 1920 to claim, on occasion, exemption from arrest in particular cases or to obtain the release of vessels upon pledging the credit of the government for the payment of judgments entered against them.

The mixed Court of Appeal of Egypt (1920) refused to follow

the decisions of the English and American courts and took jurisdiction of an action for damages, due to a collision, brought against a vessel (the *Sumatra*) belonging to the British Crown. The operation of the vessel had been confided to a private individual, it was not commanded by an officer of the Royal Navy and was engaged in a commercial voyage. The usual plea was put forward that a vessel owned by a foreign state could not be made the object of a suit, but the court held that the rule of immunity applied only when the state was exercising a public function. In this case the damages, said the court, had been done " by the employees of a foreign state in the management of its private interests and completely outside its political action." " To accord immunity in this case," it concluded, " would amount to a denial of justice, since it would deprive of relief individuals whose interests were found to conflict with the private interests of the state." [1] The decision in this case was based on a decision of the Egyptian Court of Appeal in a similar case, May, 1912.[2]

The French courts likewise make a distinction between ships owned and operated by the state for distinctly public purposes and those which are employed in ordinary commercial operations, and as to the latter they distinguish between immunity from suit and immunity from attachment and execution. The French Court of Appeals of Rennes reversed the decision of a tribunal of commerce which had declared itself competent to hear and determine a suit for damages brought against a vessel owned by the British Government, and which was being utilized for public purposes in connexion with the national defence, although it was not manned by officers of the Royal Navy and was being operated by a private shipping firm. The court held that " it was justified in applying the rule of exterritoriality, according to which states are equal and independent and are not subject to the public power of others and consequently escape the jurisdiction of their respective tribunals." The plaintiffs argued that the owners, in depositing with the court security of 100,000 francs demanded of them, had tacitly renounced their right to invoke the benefit of the rule of immunity. The court admitted that the right might be renounced but asserted that there must be positive proof of an intention to do so and it did not consider that the deposit of security constituted evidence of such intention

[1] Text in 33 *Rev. Int. du Droit Mar.* 167.

[2] *Bull. Aegypt. de Lég. et de Jurispr.*, t. 24, p. 330.

in this case.[1] But as regards vessels like those of the United States Shipping Board, which are employed in ordinary commerce with no public purpose in view, the French courts have not hesitated to take jurisdiction of actions against them and to enter judgments for damages in favour of private suitors. In fact, the Shipping Board has not contested the jurisdiction of the courts in such cases and has offered to give security for the payment of judgments entered against its vessels.[2]

Nevertheless, the French courts refuse to go further and permit the attachment of vessels against which judgments have been pronounced, for the purpose of insuring their execution. In several cases they have been asked to issue what is known in French law as a *saisie-conservatoire*, that is, a writ by which the vessel is detained until the owner has furnished security for the payment of the damages adjudged against it, the purpose being to compel him to satisfy the judgment as a condition of restitution of the ship. This the courts have refused to do. Thus the President of the Civil Tribunal of Bordeaux ordered the lifting of such an attachment which had been issued against the *Englewood*, a United States Shipping Board vessel which apparently had been chartered to the *Cosmopolitan Line*.[3] Likewise, the President of the Tribunal of Commerce of Havre held that a vessel belonging to the Brazilian Government but which was being employed for commercial purposes, could not be made the object of such an attachment.[4] The same court pronounced a similar decision in the case of the *Glenridge*, a United States Shipping Board vessel engaged in private commerce and which had apparently been chartered to a third party.[5] In these cases the courts had entertained suits against the vessels and had entered judgment for damages, but they refused to issue attachments for their detention in order to compel the satisfaction of the judgments.

The Court of Appeals of Belgium adopted the same view in similar cases.[6] The Belgian Court of Cassation had already in a notable case decided in 1903 affirmed in the strongest language

[1] Case of the *Hungerford*, March 19, 1919, 32 *Rev. Int. du Droit Mar.* 345. See a similar decision by the Court of Appeal of Paris, March 16, 1921, 33 *ibid.*, 763.

[2] Rippert, 34 *Rev. Int. du Droit Mar.* 17.

[3] 32 *ibid.*, 602 ; 47 Clunet, 1920, 621.

[4] Case of the *Campos*, 32 *ibid.*, 602 ; 46 Clunet, 1919, 747.

[5] 32 *ibid.*, 599.

[6] See the cases cited by Rippert, 34, *ibid.*, 20.

that the immunity of foreign states from suit exists only when the sovereignty of the state acting in its capacity as a public power would be affected by the suit, and not when it is engaged in commerce or private business. "If a foreign state," said the court, "may seize our tribunals for the purpose of prosecuting its debtors it must respond before them to the claims of its creditors." [1]

The Italian courts go to the full length and not only take jurisdiction of actions against the property of foreign governments not used for distinctly public purposes but they authorize seizure and execution. In a case decided in 1887 the Court of Appeals said, "When it is a question of the jurisdiction of the Italian tribunals *vis-à-vis* a foreign state, it is necessary to distinguish whether the act out of which the suit arises constitutes an act of sovereignty or a simple act of management (*atto di gestione*) done by the Government in its capacity as a simple civil person. In the former case the Italian courts have no jurisdiction; in the latter they have." (15 Clunet, 1888, 289; see also an article by Gabba, Professor in the University of Pisa, 15 *ibid.*, pp. 180 ff.)

The essential difference therefore between the jurisprudence of France, Belgium, and perhaps Egypt, on the one hand, and that of Great Britain, Germany, and the United States, on the other, is that while in the former countries the courts will take jurisdiction of actions against government-owned vessels when employed in ordinary commerce and enter judgments against them but will not issue the processes necessary to insure the execution of the judgments, in the latter countries the courts will not, generally, even take jurisdiction and allow a suit to be prosecuted to judgment. And Italian jurisprudence appears to differ from that of all of them in permitting both prosecution and execution of judgments.

The inconvenience, not to say the hardships, that may result to private claimants who are denied the right to bring suits against government-owned vessels employed as common carriers have been frequently pointed out.[2] The courts themselves in

[1] Sirey, 1904, IV., 16; Dalloz, 1903, II, 401; 31 Clunet, 1904, 417.

[2] Compare Nielsen, "Law and Practice of States with regard to Merchant Vessels," 13 *American Journal of International Law*, pp. 17–20; Walton, "State Immunity in the Laws of England, France, Italy, and Belgium," *Jour. of Soc. of Comp. Leg.*, series 3, 1920, Vol. II, pp. 252 ff.; McNair, *British Year Book of International Law*, 1921–2, p. 70; Hayes, "Private Claims against Former Sovereigns," 38 *Harvard Law Review*,

their decisions have frequently adverted to the anomaly of a special régime in which large numbers of ships engaged in ordinary commerce are entitled to exemption from legal process and they have evidently felt regret at being obliged, as they considered it, to accord such an exemption.[1] Judge Mack, in a learned opinion in the case of the *Pesaro*, said :

" Immunity should not be given vessels owned and employed by a government in ordinary times in the usual channels of trade. To deprive parties injured in the ordinary course of trade of their common and well established legal remedies would not only work great hardship on them, but in the long run it would operate to the disadvantage and detriment of those in whose favor the immunity might be granted. Shippers would hesitate to trade with government ships and sailors would run few risks to save property of friendly sovereigns if they were denied recourse to our own courts and left to prosecute their claims in foreign tribunals in distant lands." And he added, " the attachment of public trading vessels, in my judgment, is not incompatible with the public interests of any nation or with the respect and deference due to a foreign power."

It is hardly a sufficient answer to claimants who are debarred from the courts to be told that they have a diplomatic remedy, since that, involving as it does, the intervention of their own government and an investigation by another, usually means long delays and uncertain results. The reasons usually advanced by the courts in support of the immunity do not appear convincing. Judge Rellstab in the case of the *Roseric* asserted that the immunity was not based on the idea that it could be " safely accorded " but upon considerations affecting " the dignity and independence " of states and because " it was necessary for the well-being of nations that they shall not be hampered or interfered with in the use of such instrumentalities as their ships." But are the dignity and independence of a state really compromised and the exercise of its sovereign power interfered with when a court takes jurisdiction of a suit for damages against a ship owned by it and employed in purely private commercial enterprises ? There is common sense in the view of Bluntschli that when a state creates a commercial establishment and goes into private business it thereby waives *ipso facto* its sovereign dignity and should be required to respond before the courts to the

621 ; Rippert, " La Condition juridique des Navires appartenants à l'État, &c." 34 *Rev. Int. du Droit Mar.*, pp. 1 ff. ; Renard, 33 *ibid.*, 874 ; Brandis, 34 *ibid.*, 871 ; Hyde, *International Law*, I, 445.

[1] See notably the observations of Judge Hough in the *Maipo*, of Mr. Justice Hill in the *Porto Alexandre*, and of Lord Justice Scrutton in dismissing the appeal in the latter case.

claims of its creditors. Many other eminent jurists hold the same opinion.[1] It is a fair question to raise whether it is any more derogatory to the sovereignty of one state to subject it to suit for the operation of ships utilized by it as common carriers than it is to that of another state in which they may be found and which as a result of the rule of immunity is shorn of the essential sovereign attribute of administering justice to its own nationals.

It is submitted that the observations of Sir Robert Phillimore in the *Charkieh*[2] have much to commend them. Speaking of a vessel owned by an alleged sovereign, chartered to a British subject, advertised as an ordinary merchant vessel and employed for the ordinary purposes of commercial trade, he said :

> " No principle of international law, and no decided case, and no dictum of jurists of which I am aware has gone so far as to authorize a sovereign prince to assume the character of a trader when it is for his benefit ; and when he incurs an obligation to a private subject to throw off, if I may so speak, his disguise and appear as a sovereign, claiming for his own benefit, and to the injury of a private person, for the first time, all the attributes of his private character ; while it would be easy to accumulate authorities for the contrary position."

But in the case of the *Maipo*, Judge Mayer stated that the views of Sir Robert Phillimore in the *Charkieh* had been overruled by the *Parlement Belge*, and the English Court of Appeal in the *Porto Alexandre* reached the same conclusion, and it was reiterated by the Court of Appeal in the recent case of the *Compania Mercantile Argentina* v. *United States Shipping Board*. It may not be improper to observe, however, that the main purpose to which the *Parlement Belge* was being devoted was different from that of the *Charkieh*, the *Porto Alexandre*, and many of the vessels to which immunity has recently been allowed. The *Parlement Belge* was primarily a mail packet, was directly in the employ of the King of the Belgians, was officered by commissioned men of the Royal Belgian Navy and carried passengers and freight " only subserviently " to its main purpose of transporting the mails.

The *Charkieh*, the *Porto Alexandre*, and various other vessels to which the courts have lately accorded immunity from process were engaged mainly, and sometimes solely, in the private carrying trade, were officered and manned by men who had no

[1] Cf. Von Bar, Report in *Ann. de l'Inst. de Droit Int.*, XI, 414 ff. ; Despagnet, *Droit Int. Privé*, § 179 ; Weiss : *Traité de Droit Int. Privé*, 2nd ed., V, 87 ff. ; the articles of Nielsen, Rippert, and Walton cited above ; and the resolutions of the Institute of International Law, 1891.

[2] L. R., 4 A. & E., 59.

connexion with the navy and sometimes in fact were chartered to private firms or individuals. It may not be improper also to raise the question whether the decision in the *Parlement Belge* was ever intended to apply to such vessels and whether therefore the courts in the recent cases were really "concluded," as was said in the *Porto Alexandre*, by the decision in the former case. It is not altogether improbable that the decision reached in the *Parlement Belge* was also influenced in some measure by the fact that the practice of states in operating ships as ordinary carriers of commerce was at that time almost unknown and that the inconveniences which now result from the immunity accorded to extensive fleets of such ships were unforeseen. Had they been anticipated at the time, the Court of Appeal might have reached a different conclusion. In any case, the rule laid down in the *Parlement Belge* is entirely judge-made; it is not the result of international agreement or convention, and nothing but an extreme regard for the doctrine of *stare decisis* prevents the English and American courts from departing from it. It is believed that the changed situation which now exists in consequence of the practice which states have entered upon in acquiring and operating on an extensive scale fleets of ships in ordinary commerce would permit without violence to the principle of *stare decisis* a departure from the rule enunciated in the *Parlement Belge*, if it were ever intended to apply to such vessels as those operated by the United States Shipping Board.

Certainly, continental courts, like those of Germany, where the doctrine of *stare decisis* is not followed with the same rigour, are not bound by it. Yet the German court in the case of the *Ice King*, referred to above, went to the length of according the immunity to an enemy ship when by the express terms of a municipal statute of the country owning the ship (the United States Shipping Board Act of September 7, 1916) it was subject to the local law and jurisdiction of the state in which the suit against it was attempted. The plaintiff invoked that statute, but he was told that it was merely a municipal regulation, that the case must be decided on the basis of international law, which recognized the immunity claimed, that an exception to the rule, introduced by municipal legislation could not be admitted and that a waiver of immunity could only be made by international agreement. That such a decision, which in effect means that a state cannot by its own municipal legislation renounce a right

created by international law, should have provoked criticism in Germany is not surprising.[1]

Obviously, if the existing practice of states of operating fleets for commercial purposes is to become permanent, the rule of immunity should be modified. It has been suggested that the recognition of the immunity might be conditioned upon an understanding that the flag state should assume full responsibility for the acts of its ships and place within the reach of individual claimants a simple and direct means of obtaining justice (Hyde, I, 445). It is submitted, however, that what is needed is more than an understanding between particular states. A definite agreement should be reached and embodied in an international Convention. The only Convention dealing with the rights and duties of merchant vessels is that of 1910 with respect to assistance and salvage at sea, but it is not concerned at all with the matter of immunities from legal process. It may be observed, however, in passing that this Convention, by expressly excluding from its application ships of war and government ships " appropriated *exclusively* to a public service " (Article 14), recognizes inferentially that there is a valid distinction between such vessels and those employed wholly or in part in ordinary commercial operations. This distinction, it is submitted, should be the basis of whatever international agreement is reached regarding the immunities of government-owned or controlled ships. As Judge Mack observed in the case of the *Pesaro*, the mere fact of government ownership should be regarded not as the primary test of the right of immunity, but that the nature of the service in which the ship is engaged and the purpose for which it is employed should be the test.

The following solution is suggested : first, that warships and other vessels owned by governments or under their requisition or control, and employed wholly or preponderantly for public purposes, should be exempt from arrest, suit, or attachment ; second, that vessels owned or chartered by, or under the requisition and control of a state, but employed exclusively, or in larger part, as ordinary carriers of commerce, especially in time of peace when the business has no relation to the national defence or other distinctly public service, should be liable to suits in tort or contract and subject to attachment and detention as surety for the payment of judgments entered against them.

[1] See the observations of Dr. Brandis, 34 *Rev. Int. du Droit Mar.*, 871.

LAWS OF MARITIME JURISDICTION IN TIME OF PEACE WITH SPECIAL REFERENCE TO TERRITORIAL WATERS

By H. M. CLEMINSON.

EVERY one must rise from a study of the subject of territorial waters impressed by the great divergence in the views that have been held and expressed by both states and jurists and the possibilities of international dispute that the subject presents.

It has often been the subject of general international discussion, and, as a member of the International Law Association, I had hoped to take part in such a discussion in September last at the Stockholm Conference of the International Law Association. If the Association is able to promote international agreement it will have done one more piece of valuable international work.

The history of the subject makes it fascinating reading and the success of the Association will depend upon the ability to read aright the lessons of history and to apprehend and enunciate simple basic principles.

It was more than a happy augury that a draft Convention, which the committee of the Association had prepared for consideration at Stockholm, treated the subject as a subordinate part of the wider question of the laws of maritime jurisdiction. This draft was circulated in advance of the Conference and its low place in the programme enabled those members of the committee who were not preoccupied with other subjects to give further consideration to the draft and to put forward certain alterations which it was felt were improvements, the more important being calculated to invite consideration of what may be called the commercial aspect. The few hours allotted to the subject did not permit of a full discussion and it is expected that the subject will be further considered at the Marseilles Conference of the Association in 1926.

The commercial interests represented at Stockholm manifested a real interest in the subject, and if their effective co-operation through the International Chamber of Commerce and the International Shipping Conference can be secured, the Association can proceed with its work in some confidence that positive results

may follow from what might otherwise be a somewhat academic though valuable discussion.

The Chairman, Dr. Alvarez, the Secretary, Dr. Colombos, Professor Pearce Higgins who took part in the Stockholm discussion and has been added to the Committee, or any other member of the Committee could speak with greater erudition than I, who can only approach the subject from the point of view of the practitioner in close touch with the commercial interests of the community.

The amended draft Convention has not, I think, been published and it will be convenient to set it out in this paper.

The principles of English common law have grown naturally and almost imperceptibly. This has given flexibility, and the English respect for case law has given greater certainty in the application of the law to the individual case than can be given by a written code. For these reasons English lawyers have a strong prejudice against codification and are therefore not predisposed to " favour " conventions, but if there is to be a conscious effort at international agreement on subjects in which there is a real divergence of view or uncertainty, something must be put into writing in the form of a convention. It must be as short and as simple as possible and must lay down broad principles and simple rules. It should not be forgotten that the principle is the big thing and should be followed even to the point of making appropriate exceptions to rules ; otherwise it will be found that the rules will subvert and defeat the principles which they were intended to further.

After wisely excluding by the title the question of maritime jurisdiction in time of war, the first article seeks to suggest the first basic principle :

ARTICLE 1.

" To secure the fullest use of the seas, all states and their subjects shall enjoy absolute liberty and equality of navigation, transport, communications, industry and science in and on the seas."

This seems fairly to express the common object of the human race. In the course of human endeavour men have found that the fullest use of the land can best be secured by its sub-division into countries, each under the control, that is to say, under the exclusive jurisdiction, of some sovereign state. The same plan might have been followed in regard to the sea ; indeed the history of the last 2,000 years showed more than a tendency in that direction.

In the second half of the Middle Ages the Adriatic Sea was recognized as part of the sovereignty of the Republic of Venice and the Ligurian Sea as part of the sovereignty of the Republic of Genoa. Sweden and Denmark claimed the sovereignty of the Baltic, while Great Britain claimed the narrow seas, the North Sea and even the Atlantic Ocean from the North Cape to Cape Finisterre; Spain and Portugal made still bolder claims—Portugal claimed the whole Indian Ocean, and the Atlantic south of Morocco; and Spain, the Pacific Ocean and the Gulf of Mexico. Thus, at the end of the fifteenth century practically every part of the seas was claimed as part of the sovereignty of some maritime power.

If, in exercising the sovereignty each claimed, the states had given effect to the principle laid down so clearly by Ulpian when he said the " Sea is open to everybody by nature " and Celsus when he said the " Sea like the air is common to all mankind," and had used their sovereignty to permit the fullest use of the sea and to restrain abuses, we may well conceive that to-day the sea, like the land, would be subdivided under the sovereignty of individual states.

To some extent effect was given to the principle of freedom, for some states conceded to foreign subjects in common with their own, the use of the seas over which they claimed sovereignty and secured them in that use by protecting them from the abuse of piracy. In return for this protection the foreigners were prepared to make some payment commensurate with the cost of the protection given. This willingness to admit and protect foreigners largely accounts for the fact that some claims to sovereignty over quite large tracts of open sea were more or less successfully asserted for some hundreds of years.

But, for the most part, the principle of common use was denied by those who claimed sovereignty. Its denial by Spain and Portugal mobilized all other states in the determination to establish once and for all the principle of the freedom of the seas. This led first to a moderation and ultimately to the almost complete abandonment by all states of any claim to sovereignty over the seas.

The jurisdiction claimed over territorial waters, including gulfs, bays, &c., is a remnant of these Middle Ages claims to sovereignty.

The principle of the Freedom of the Seas being established and the plan of sovereignty over the seas having been repudiated, what plan should be adopted to secure the free use of the seas ?

This plan is indicated by Article 2 :

ARTICLE 2.

" To further this object and prevent abuses and to maintain its own integrity and good government, each maritime state shall exercise territorial jurisdiction at sea within the limits hereinafter provided and not further, save to the extent that jurisdiction is conferred by this and other international conventions or treaties or by a generally recognized principle of international law, usage or custom and outside these limits each state shall exercise jurisdiction over its property and subjects and their property at sea."

PERSONAL JURISDICTION OF THE FLAG.

The states have conceded to each other sole jurisdiction over their own subjects and their property at sea and the persons and property identified therewith.

Thus the State of France concedes to the State of Italy the sole jurisdiction over an Italian ship at sea, not only when it carries Italian subjects and Italian property, but even when carrying French subjects and French property. The status of the Italian ship is not that of Italian territory, but is analogous to it. The analogy is not complete, but is closer than most analogies.

As regards internal affairs on board, the master keeps order by exercising the authority of the state whose flag he carries. As regards external affairs, each state provides in its own courts a recourse and redress for external wrongs committed by the ship. Thus if a ship of one state negligently damages the ship of another, the state whose flag the negligent ship carries recognizes that there has been an abuse of the free use of the sea and provides in its own courts a remedy against the wrong-doing ship which the injured vessel may seek. Thus we see that each state in its own Courts of Justice provides redress against its own subjects and their property for abuses which have *pro tanto* deprived others, whether its own subjects or not, of the free use of the sea.

We must distinguish the jurisdictional grounds of the redress given by the state of the flag of a wrong-doing ship from those on which redress is given in most states against wrong-doing ships of foreign countries when found in their ports. In the latter case the foreign vessel has voluntarily submitted to the foreign jurisdiction, and it has been felt to be both just and convenient to provide access to the courts of the state where the wrong-doing vessel is found for the purpose of obtaining redress for wrongs committed outside. Thus if a foreign vessel, which has negligently damaged

a British vessel, be within three miles of the coast of England the Admiralty Court may arrest her at the suit of the injured British vessel. But such a vessel if she be outside the territorial waters of England may not be arrested by any but the officers of her own state. Similarly if murder be committed on a foreign ship at sea, even though the murdered person be a British subject, a British officer may not board the foreign ship to exercise restraint or other form of jurisdiction; the wrong done will be adjudged and punished by and in accordance with the law of the state of the ship's flag.

Definition of Rights and Wrongs and Appropriate Remedies.

In exercising the right and performing the duty left to it, each state is guided by broad general principles which make their appeal to all nations as to what is or is not an abuse, that is to say, what is to be regarded as right or wrong; but there is, and must necessarily be left to the country, a wide if not even complete discretion in defining right and wrong and in prescribing appropriate remedies.

Concurrent Jurisdiction in Piracy.

Piracy is peculiar. Here states generally have conceded a concurrent jurisdiction. Perhaps the pirate ship was regarded as having no flag, or, if it could be said to have a flag, the crime of piracy amounted to a proof of the impotence of the state of the flag to exercise its own jurisdiction. In either case it was desirable that the state nearest at hand should act and act promptly in the maintenance of the freedom of the seas. In recent years piracy has ceased to be a grave menace, owing in part to the effective measures of suppression and in part to the increasingly effective control of each state over those subject to its own jurisdiction both geographical and personal; some countries, including the U.S.A., have, perhaps for this reason, refrained from subscribing to a Convention which incorporates this principle in the form of written rules.

Cables—An Example of Use: Remedy for Abuses.

Navigation is the chief but not now the only user to which in modern times the seas may be put. For instance, cables are laid. Every state recognizes that the laying down, maintenance

and use of cables is a proper use of the seas in times of peace, and all but an enemy belligerent recognize it as such in time of war. It follows that abuses must be followed by an adequate remedy, and so every state provides a remedy in its own courts against its own wrong-doing nationals and their property, to which the aggrieved owner of a cable may resort who has suffered by the wrong, e. g. a negligently trailed anchor.

Use and Abuse in Time of War.

Though the question of maritime jurisdiction in war-time is excluded, it would be useful to see how in time of war effect is given to the principle that the seas are open to the free use of all, but not to their abuse. We have seen how in order to secure the fullest use of the sea, there is left to each country the right and duty to take appropriate steps to prevent abuse, leaving each country to exercise its own judgment of what is or is not an abuse of the sea. Some countries might well choose to regard the transport of opium as an abuse of the sea and forbid its nationals to engage in it, just as most countries forbid their nationals to engage in the slave-trade by transporting slaves across the high seas. But in time of war it is clear that in the eyes of some countries certain forms of activity must be regarded as useful or harmless which in the eyes of other countries will be regarded as positively harmful. Thus a belligerent will necessarily regard the sea commerce of another belligerent as harmful, for it contributes materially to his strength as an enemy. Clearly therefore it must be left to each belligerent to restrain what is in his eyes an abuse of the seas. In the same way, if a neutral ship engages in commerce which assists one of the belligerents (e. g. by the carriage of contraband), neither the belligerent served nor the neutral can be expected to regard this action as an abuse of the freedom of the seas, and therefore cannot be expected to restrain it; yet the action is undoubtedly hurtful to the other belligerent and must be regarded by him as an abuse. In these circumstances it is left to the belligerent himself to restrain or prevent the action thus calculated to harm him. The plan of conceding jurisdiction to the flag fails and, as in the case of piracy, must give way to another if we are to give the fullest possible effect to the principle of free use.

Summary of Plan Adopted to Secure Free Use.

We have now seen what means the nations have adopted to promote the best use of the high seas :

(i) They have established the principle of common user.
(ii) They have left to each the right and the duty of preventing abuses by the exercise of its authority (*a*) generally within the state itself and its territorial waters, and (*b*) specially outside of territorial waters, e. g. on the ships of the state.

The freedom of the seas was not the only or even primary motive in conceding jurisdiction over territorial waters. That motive was to facilitate the maintenance by each maritime state of its own integrity and good government, that is to say establish the observance of law and order. In conceding territorial jurisdiction and so contributing to the security of the state, the nations were making a concession which ultimately furthered the object they had in view—to secure the freedom of the seas.

Reconciliation of Jurisdiction of Flag with Territorial Jurisdiction.

The plan is simple but in working it out many questions must be solved ; for instance, the jurisdiction of the state over its own ships and those on board does not cease when the ship passes from the high seas into the territorial waters of another state. The Captain will obey and administer the laws of his own country on board his ship, but the jurisdiction of the state over that ship and its subjects on board is subordinated to the over-riding jurisdiction of the territorial state. The territorial state has ever in the past been slow to exercise its power and, generally speaking, has confined the exercise of its jurisdiction to acts which take effect outside the vessel. In recent years, however, there has been a tendency to apply national laws not only to national ships but to foreign ships within territorial waters. This tendency has given rise to direct conflict of laws and interference with commerce which has often been much resented by the foreigner.

To meet these objections maritime countries have taken steps to adopt the same standards and to accept compliance with foreign laws applying substantially the same standards, notwithstanding that the laws are naturally not identical. A great deal has been

done by the governments and by the shipowners co-operating in diplomatic, legal and expert international conferences.

It would undoubtedly be a great advantage in any convention on maritime jurisdiction to lay down clear guiding principles. Articles 3 and 4 may do little more than suggest the difficulties of doing so.

The immunity from the territorial jurisdiction of vessels passing through the territorial waters of another state but not visiting its ports has long been recognized, and the extent to which jurisdiction of his own country over a person on board a foreign ship is subordinated to that of the state of the flag, whether in or outside territorial waters, is a matter into which it is unnecessary to enter in detail in a convention of this kind.

As submitted for discussion Articles 3 and 4 of the amended draft read thus :

ARTICLE 3.

" The jurisdiction of a state over its subjects and their property when identified with property within the jurisdiction of another state shall be subordinate to that of the latter.

A state has a right to continue on the high seas a pursuit commenced within its territorial waters and to arrest and pass judgment upon any ship which has committed an offence within its waters. Pursuit must not be continued within the territorial waters of another state, and cannot be resumed after the ship has entered the port of another state."

ARTICLE 4.

" When a vessel is passing through the territorial waters of another state or visiting its ports, the vessel, its master, officers, crew, passengers and cargo are only subject to the jurisdiction of such state for acts which take effect outside the vessel. All other acts relating to such persons or property shall be governed by the law of the state whose flag the vessel is entitled to fly.

Any state, however, may exercise jurisdiction over foreign vessels visiting its ports for the purpose of granting redress for wrongs committed outside its territorial jurisdiction when justice and convenience require it.

It is desirable that Regulations for Safety of Life at Sea applicable to national and foreign vessels shall be in accordance with international agreement."

It will be seen that Article 3 suggests that the right of pursuit from territorial waters on to the high seas should be recognized and suggests a formula.

Under these articles the sole jurisdiction conceded to each state over the ships of its own subjects at sea and their persons and property is maintained. When subjects of one nationality or their property are on board a vessel of another nationality, the

jurisdiction of their own country will necessarily continue to be subordinated to that of the flag.

Article 5 reads :

" Effect shall be given to the principles of equality of treatment laid down in the Convention of the International Régime of Railways, so far as it is applicable to the sea, and in the Convention on the International Régime of Maritime Ports."

The League of Nations Conventions on maritime ports and railways lay down clear principles of equality of treatment of vessels of all flags in all ports. Without free ports it is idle to speak of the freedom of the seas.

Territorial Limit.

Article 6 reads :

" The territorial jurisdiction of each state shall extend over the waters along its coasts for three marine miles from low-water mark at ordinary spring tide."

All nations concede a territorial jurisdiction over a maritime belt of three miles, while some claim and mutually concede more. The origin of the three-mile rule, first laid down in the United States of America in 1793, was the range of a gunshot, but notwithstanding the increased and increasing range of the gunshot it may be fairly stated that the limit of three miles is more generally and firmly established than ever.

It is suggested by some that the limit should be increased by general international agreement. Would that step be a forward or a retrograde one ? In the light of history it would seem to be clearly retrograde and before suggesting that there should be any increase we should, I think, ask ourselves (1) what objects can usefully be served by an increase, and (2) if those objects are desirable ones, can they not be served as well or even better by some other means ?

Would an extension assist navigation ? The ship-owners will, I think, generally say that it will not.

Would it assist in customs, sanitary and criminal law administration ?

The cases when customs and criminal laws could be more effectively enforced by exercising a territorial jurisdiction beyond three miles are rare. While occasions may arise when it might be possible to seize outside the three-mile limit a vessel guilty of a

breach of customs laws, an occasional escape will be of no importance.

The occasional escape of guilty persons is no ground for abolishing the principle of fair trial, and does not interfere with the maintenance of good order. The material factor is the watchfulness of an intelligent police force and the detection of wrong-doers in a fair percentage of crimes committed.

Recently we have seen how the United Kingdom and the United States have successfully negotiated a treaty which, without extending the territorial waters of the United States, has given her a right to seize foreign vessels when engaged in attempts to commit offences under the alcoholic prohibition laws of the United States. In the same treaty the United States explicitly state their adherence to the principle to which attention has already been drawn, viz. that municipal laws should not be allowed to interfere with the internal economy of a visiting vessel.

I have been unable to elicit any case where an extension of the limit would assist the administration of sanitary regulations.

Would the construction of lighthouses be encouraged ?

These are sometimes constructed at a greater distance than three miles from the shore and international lawyers have disputed whether the erection of a lighthouse entitles the country building it to claim a territorial belt around it. One would think the discussion somewhat academic. Personally I should feel strongly disposed to regard the erection of a lighthouse as converting a rock into an island and to concede that, as in the case of a newly raised island, there would be recognized a territorial belt around it.

To increase the territorial belt around the mainland would not, it seems to me, be of any value for encouraging the building of lighthouses nor for assisting in their maintenance.

It has been suggested that a wider belt might be desirable to encourage the erection of floating islands for aerial or other purposes. I cannot imagine it.

If by a floating island is meant a great pontoon permanently moored, then I imagine the Law Courts and Chancellors of the world would regard obstructions either by it or of it as equally justifying an appropriate remedy.

Submarine Mines, Tunnels, and Cables.

Nor would the extension of territorial jurisdiction beyond three miles assist in encouraging submarine mines or tunnels or the laying of submarine cables.

The principle recognizing particular ownership of submarine mines, tunnels and cables, like that of ships, has been well recognized, and, in the case of cables at least, incorporated in an international Convention. They are all a form of permanent occupation constituting a proper use of the sea by occupation such as is recognized by the whole world to be desirable.

While the state of the owner of the tunnel or mine regulated internal affairs, I imagine that all states would give a recourse against a wrong-doer within its jurisdiction who, by a deliberate or negligent act, should do hurt to the mine or tunnel.

Tunnels between two separate countries would doubtless be the subject of conventions and in any case it is quite clear that an extension of the three-mile limit would be of no practical value to encourage the exploitation of the sea by mines and tunnels.

Pearl and Oyster Fisheries.

Closely analogous to the temporary occupation of the sea by ships and its permanent occupation by cables is that of its occupation by oyster beds both for pearl and oyster fisheries. Such beds are sometimes created and nurtured and always require some form of protection if their existence is to be secured. They often exist more than three miles from the nearest shore. They have given rise to much discussion though the subject now appears to be closed.

If the fullest use of the sea is to be encouraged, enterprise must be encouraged and this can only be done by recognizing the special interests or property of those whose efforts are responsible for the existence and continued existence of such beds. It is therefore right that the appropriate state should exercise such jurisdiction over the oyster beds as is necessary for their protection. The presence of any such beds when more than three miles from a coast need not demand the concession of a general territorial jurisdiction over the area of sea under which they lie, still less need their existence call for an enlargement of the territorial belt of the whole world or even of the adjoining territory.

All that is wanted is a clear understanding and application of

the principles establishing the free use of the sea. This the nations have done, conceding to the states who are interested in the beds the right to avert wilful theft. Indeed the nations have even conceded the right to make regulations to prevent other forms of destruction.

Fishing.

Would the suggested increase encourage fisheries and meet the growing requirements of the fishing industry? The attempt to exclude foreign vessels from participation in in-shore fishing and the claims by some countries to reserve a maritime belt wider than three miles from the shore have perhaps been a more fertile source of dispute in time of peace than anything else. It seems to be generally agreed that the supply of edible fish is by no means inexhaustible; that efforts will have to be made to conserve and increase the supply by regulations and hatcheries. This will necessarily call more and more for international agreement by convention or otherwise. It is difficult to see how a general extension of territorial jurisdiction beyond the three miles could assist. Might not such an extension have quite the opposite effect? The power by one country to exclude others from grounds to which fish resort would not encourage those other states to join in protective measures or hatchery schemes. Prima facie the reservation to the subjects of any particular state of the right to fish in the sea for the natural products of the sea has always seemed inconsistent with the established general principle, unless it can be compared with personal property that requires industry and enterprise to create, or land that equally requires both to make it fruitful. If and where it can be so compared, then measures of conservation would seem to be entirely consistent with the general principle that a species of proprietary interest should be recognized in those who or on whose behalf industry has been expended. I can conceive that a community has devoted itself consistently, year in year out and all through the year, to exploiting for the benefit of the purchasing community a certain fishing area. Let us suppose that strangers to the ground come and take the best of the fish and go away; that if this is permitted the fishermen will be unable to maintain themselves, their wives and families. That seems to be a strong case for special consideration, and attention to it would the more effectively give effect to the principle that the general use of the sea is to be encouraged. It is a matter for agreement and even

bargaining between nations. It is not an occasion so to depart from the very principle of common use as to authorize exclusions in a belt of say four miles throughout the world.

Naval Defence.

Would naval defence be assisted ?

There seems to be a preponderating consensus of opinion among those states whose security depends most upon naval defence that it would not. The seas are just as free to ships of war and defensive operations as they are to mercantile navigation or any other specific object.

In short, it does not seem that a general extension of the three-mile limit would be of any value for any purpose. We have seen that where action is called for it can be arranged by conventions or bilateral treaties.

Islands.

Article 7 reads :

" In the case of islands the zone of territorial waters shall be measured round each of the said islands in accordance with the preceding article."

This seems to be a sound general rule, leaving peculiar circumstances to be dealt with by special international agreement, either express or implied.

Bays, &c.

Article 8 reads :

" With regard to bays and gulfs, territorial waters follow the sinuosities of the coast, unless an established usage has sanctioned a greater limit."

There is no doubt that in respect of many bays and gulfs general assent concedes a territorial jurisdiction. It is often desired to exercise a jurisdiction in the nature of territorial jurisdiction in bays for special purposes, e. g. oyster beds, and it seems desirable rather to encourage than discourage concessions of jurisdiction in such cases. If the concession is to be strictly limited, then there is more likelihood of a concession being made by international agreement. Such limitation is accordingly provided for in the next article.

Article 9 reads :

" Where a territorial jurisdiction for a special purpose over bays, gulfs or other arms or parts of the sea is conceded to a state by international agreement, whether express or implied, the jurisdiction so exercised shall be limited strictly to the purpose for which the jurisdiction is conceded."

The next few articles speak for themselves :

ARTICLE 10.

" The territorial jurisdiction of a state over its territorial waters extends also to the bed and subsoil of the area as well as over the waters themselves."

ARTICLE 11.

" The ships of all countries, public as well as private, have the right to pass freely through territorial waters."

ARTICLE 12.

" No state or group of states may claim any right of sovereignty, privilege or prerogative over any portion of the high seas or place any obstacle to the free and full use of the seas."

Articles 13, 14, and 15 read :

ARTICLE 13.

" In the case of straits and natural channels which connect two or more seas and which divide two or more states, the limit of the territorial jurisdiction of each state shall be the middle line of the strait or channel which divides them, when the strait or channel is six miles or less in width."

ARTICLE 14.

" Where a strait or channel is more than six miles in width, the right of territorial jurisdiction of the littoral states extends to three miles from their respective coasts ; beyond this limit its status is the same as on the high sea."

ARTICLE 15.

" When the power to make transit regulations is not vested in an international body, the regulations enacted by the littoral states shall, as far as possible, be uniform and such as not to interfere with freedom of navigation."

These articles lay down a clear general rule which can be varied by agreement, and seems far preferable to any attempt to make special provisions.

Article 16 reads :

" In the absence of special conventions, canals constructed for the purpose of connecting two seas by a state which is sovereign over both shores or by two or more states shall be governed by the regulations which such states shall make in accordance with the principles of free navigation established by the present convention."

INTERNATIONAL COMMISSION.

Articles 17 to 21 contain an interesting proposal. It has been suggested that an International Commission which will specialize in knowledge of the kind of questions arising under the convention

would be of great value in promoting agreements and inquiring into disputes. It is to be observed that it is not suggested that the commission should usurp the functions of parliaments nor even take punitive powers. A commission with such powers would not be likely to meet with general acceptance. The commission is not inconsistent with the existence of separate specialized commissions such as Fisheries or Sanitary Commissions.

ARTICLE 17.

"To assist in furthering the objects of this convention, and of settling disputes amicably, an International Commission composed of delegates appointed by maritime states shall be established."

ARTICLE 18.

"The Commission shall be competent to receive and report upon complaints presented to it by states against any infringements of the present convention."

ARTICLE 19.

"In all cases where a state does not take action, the right to present complaints to the Commission shall appertain to individuals subject to their obtaining a fiat from their state."

ARTICLE 20.

"Whenever it appears to the Commission that a further convention or regulations could usefully be made to secure the more effective user of the seas, whether in navigation, transport, communications, industry or science, or to prevent abuse, the Commission may take steps to promote international adoption of such convention or regulations."

ARTICLE 21.

"The Commission shall determine its place of meeting. It shall elect from time to time its president, organize its secretariat, and formulate its rules of procedure."

EXPROPRIATION AND INTERNATIONAL LAW

By ALEXANDER P. FACHIRI,

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In the period that has elapsed since the termination of the war, legislation has been introduced in several countries, more particularly the new or reconstituted states that have emerged as a consequence of the European upheaval, providing for the redistribution of land on terms which involve the total or partial confiscation of private property. The purpose of this article is to examine the question whether such legislation, in so far as it applies to the subjects of a foreign state, gives rise under international law to any remedy available to such state for the protection of its subjects from the resulting injury and loss. In the obscurity which hangs over the subject an attempt will be made to ascertain what are the principles to be applied, and, especially, whether the recognized rules of international law and practice afford a sufficient basis for the conclusion that such action amounts to a breach of international law entitling the state which, through its subjects, is affected, to demand reparation as of right.

The legislation in question, although varying in many respects according to the economic conditions and political views prevailing in the different countries where it has been adopted, has certain broad characteristics in common. These may be described as follows: Large landed properties are expropriated or "nationalized" for the purpose of being divided up for the benefit of small cultivators—principally ex-soldiers—and the former owners are either given an inadequate "indemnity," in cash or in bonds, or, though this is rarer, no compensation at all. The proportion by which the "indemnity" falls short of the value varies under the different laws, but in each case there is an element of confiscation, in the sense that the amount of the compensation provided cannot on any fair basis be regarded as commensurate with the real value of the property. Finally, the laws do not in terms discriminate between nationals and foreigners.

Taking the above as the point of departure, let us consider whether there is any, and if so what, rule of international law to which recourse can be had.

Two propositions can, it is submitted, be laid down as forming part of the law of nations :

1. A state is entitled to protect its subjects in another state from injury to their property resulting from measures in the application of which there is discrimination between them and the subjects of such other state.

2. A state is entitled to protect its subjects in another state from *gross injustice* at the hands of such other state, even if the measure complained of is applied equally to the subjects of such other state.

The subject of protection is mostly dealt with in general and guarded terms by writers on international law, but it may be useful to refer to a few of the more illuminating passages. Westlake in the first of his Collected Papers [1] shows how the treatment of aliens, within the state, forms part of international law. He says this :

" International law is the body of rules prevailing between states. It may be described as the body of rules governing the relations of a state to all outside it, whether other states or private persons not its subjects. These definitions are not inconsistent, because where international law allows a state to have direct relations with a private person not its own subject, it is only by virtue of a rule prevailing between states that this is so. Any state may capture, try and execute a pirate, whether its own subject or not. Any belligerent state may capture, try and condemn a ship belonging to a neutral owner for violating a blockade established by it. This is so because it is a rule between states that his own state may not interfere for the protection of the pirate or the blockade-runner. If a state presumes to act directly against a private foreigner in a case in which no international rule excludes the state to which the latter belongs from protecting him, the matter becomes one between the two states ; the foreigner's state is injured even though it may not seek redress."

In a later passage [2] the learned author, explaining the nature of private international law, says this :

" Hence arises the necessity of determining, at least to some extent, the limits of a state's jurisdiction and of the application of its laws to private matters. The science of those limits is called private international law. . . . It is true that the international society leaves to the states which are its members considerable latitude with regard to that science, but not an unlimited latitude. A state might depart so widely from any accredited principles, in its claim to exercise jurisdiction or apply its laws, that a foreigner who suffered by such departure

[1] *Collected Papers on Public International Law*, pp. 1–2. [2] *Ibid.*, pp. 9, 10.

would be considered to have suffered an international wrong and his state would resent it. Therefore, state rules affecting the interests of individuals are in some degree concerned with international principles, and a part of the body of law which regulates those interests is common ground to a state and to the society of states."

Finally, after showing that international law arose among states having a common and in that sense an equal civilization, Westlake proceeds : [1]

"The common civilization then, explained as it has here been explained, contains the principle that the institutions, whether of Government or of Justice, which the inhabitants of a state find suitable to themselves, must normally be accepted as sufficient for the protection of foreigners among them. These foreigners are subject to the local Courts and Authorities . . . and their own Governments will not, *normally*, interfere for their protection so long as they enjoy equal treatment with natives" ;

and by illustrations from actual practice [2] he makes good the two rules referred to above : viz. no discrimination ; no gross injustice even without discrimination.

Hall [3] deals with the subject thus :

"States possess a right of protecting their subjects abroad which is correlative to their responsibility in respect of injuries inflicted upon foreigners within their dominions. . . . Broadly, all persons entering a foreign country must submit to the laws of that country ; provided that the laws are fairly administered they cannot as a rule complain of the effects upon themselves, however great may be the practical injustice which may result to them ; it is only when those laws are not fairly administered, or when they provide no remedy for wrongs, *or when they are such*, as might happen in very exceptional cases, *as to constitute grievous oppression in themselves*, that the state to which the individual belongs has the right to interfere in his behalf."

Oppenheim treats the question as follows :

"Although aliens fall at once under the territorial supremacy of the state they enter, they remain nevertheless under the protection of their home state. By a universally recognized customary rule of the law of Nations every state holds the right of protection over its citizens abroad, to which corresponds the duty of every state to treat foreigners on its territory with a certain consideration." [4]

"In consequence of the right of protection over its subjects abroad which every state enjoys and the corresponding duty of every state to treat aliens in its territory with a certain consideration, an alien, provided he owns some nationality, cannot be outlawed in foreign countries, but must be afforded protection for his person and property. The home state of the alien has, by its

[1] *Collected Papers on Public International Law*, p. 103.
[2] *Ibid.*, pp. 104–10.
[3] *International Law*, 7th ed., § 87.
[4] *International Law*, 3rd ed., Vol. I, § 319.

right of protection, a claim upon such state as allows him to enter its territory that such protection shall be afforded and it is no excuse that such state does not provide any protection whatever for its own subjects." [1]

Calvo, who, as a member of one of the South American Republics which have suffered in a special degree from foreign intervention, takes a narrow view of the occasions justifying it,[2] recognizes that

" à ceux-ci (les étrangers) l'État, par le seul fait qu'il leur a permis l'accès chez lui, doit l'assurance qu'ils ne seront ni lésés ni maltraités tant qu'ils y séjourneront ; ils conservent du reste la faculté d'invoquer la protection de l'État auquel ils appartiennent." [3]

Bonfils [4] says this :

" Un État peut-il contraindre un autre État à modifier sa législation, quand celle-ci, dans son contenu actuel, peut être pour cet État ou pour ses sujets une cause de dommages ? Non . . . *le droit de l'État étranger . . . lésé dans* [*la personne*] *de ses sujets, se réduit à formuler des réclamations et à exiger une réparation.*"

The United States have always taken a high view of their duty of protection, and their right to intervene in order to make such protection effective. Numerous instances are given in Moore's *Digest*,[5] from which it will be seen that the principle is consistently adhered to that measures affecting the property of American citizens are, in proper cases, a ground of intervention and that equality of treatment with natives is not a conclusive answer. One or two passages from diplomatic correspondence will serve to make the American attitude clear :

" The United States believe it to be their duty, and they mean to execute it, to watch over the persons and property of their citizens visiting foreign countries, and to intervene for their protection when such action is justified by existing circumstances and by the law of nations." [6] " It cannot be admitted that in every case the rights of a foreigner in that country [Peru] may be measured by the extent of the protection to person and property which a citizen might obtain. . . . it not infrequently happens that citizens of a country are compelled to endure injuries which would afford ample basis for international intervention, if they were inflicted on foreigners." [7] " It may in general be true that when foreigners take up their abode in a country they must expect to share the fortune of the other inhabitants and cannot expect a preference over them. While, however, a

[1] *International Law*, 3rd ed., Vol. I, § 320.
[2] See *Droit International*, Livre XV, §§ 1276, 1278.
[3] *Ibid.*, Livre VII, § 514.
[4] *Droit Int. Pub.*, 5th ed., § 262.
[5] See Vol. VI, pp. 247–324.
[6] Sec. of State Case to Mr. Body, March 3, 1860, cited in Moore's *Digest*, Vol. VI, p. 287.
[7] Sec. of State Bayard to Mr. Buck, August 24, 1886, *ibid.*, p. 252.

Government may construe according to its pleasure its obligations to protect its own citizens from injury, foreign Governments have a right, and it is their duty, to judge whether their citizens have received the protection due to them pursuant to public law and treaties." [1] " If a Government could set up its own municipal laws as the final test of its international rights and obligations, then the rules of international law would be but the shadow of a name, and would afford no protection either to states or to individuals. It has been constantly maintained and also admitted by the Government of the United States that a Government cannot appeal to its municipal regulations as an answer to demands for the fulfilment of international duties." [2] " The duty is always incumbent upon a Government to exercise a just and proper guardianship over its citizens whether at home or abroad. A municipal act of another state cannot abridge this duty... No country is exempted from the necessity of examining into the correctness of its own acts. A sovereign who departs from the principles of public law cannot find excuse therefor in his own municipal code." [3]

The existence of the two rules mentioned above thus seems sufficiently clear, but the difficulty lies in ascertaining the scope of the second. Apart from general statements of principle, such as those just referred to, authority in the way of actual precedents relevant to the subject of this article is scanty. But it is not entirely lacking and some light is to be derived from the following cases :

In the year 1836 the Sicilian Government proposed to grant to a French company a monopoly for purchasing and exporting whatever sulphur was produced in the country.[4] When this became known to the British Government strong protests were made on the ground that the rights of British subjects trading in sulphur were infringed by the monopoly, and a long diplomatic correspondence ensued.[5] The protest was based primarily upon the Treaty of 1816 between Great Britain and the Kingdom of the Two Sicilies, which contained a most favoured nation clause and also a provision (Art. V) conferring upon British subjects the right to dispose of their personal property of every kind in any way without the smallest loss or hindrance. The Sicilian Government, notwithstanding the protest, granted the monopoly and, after considerable vacillation, declined to withdraw it. Matters reached such a serious pass that H.M. Government went

[1] Sec. of State Fish to Mr. Foster, December 16, 1873, *ibid.*, p. 265.

[2] Sec. of State Bayard to Mr. Connery, November 1, 1887, *Compilation of Reports of Committee on Foreign Relations, U.S. Senate*, 1887, pp. 751, 753.

[3] Sec. of State Frelinghuysen to Mr. Morgan, February 17, 1885, Moore's *Digest*, Vol. VI, p. 312.

[4] See *State Papers*, Vol. 28, 1839–40, p. 1163.

[5] *Ibid.*, pp. 1163–1242 ; Vol. 29, 1840–1, pp. 175–204 ; Vol. 30, 1841–2, pp. 111–20.

to the length of ordering warships to be held in readiness to proceed to Naples, whereupon the Sicilian Government gave in, abolished the monopoly and agreed to the setting up of a Commission for the purpose of liquidating the claims of British subjects against the Government for losses sustained by them in consequence of the offending contract.[1] It is to be noticed that the claims fell under three categories : (1) Proprietors and lessees of mines who suffered impediments in raising or exporting sulphur by reason of the monopoly ; (2) Persons who were prevented from fulfilling their contracts for the delivery of sulphur, and (3) persons who having bought sulphur were forbidden to export it. The sums awarded by the Commission were duly paid.[2]

The first comment that may be made upon this case as a precedent is, of course, that the act complained of was the breach of a treaty. This point will be dealt with separately later, but in the meanwhile it should be noticed that it was not so much the most favoured nation clause as Art. V of the treaty which was relied upon by the British Government,[3] and, further, that in addition to treaty provisions the complaint was based upon the interference with the right of British subjects under the laws of the country to dispose freely of their property.[4] It may also be mentioned that the Sicilian Government raised the arguments (1) that foreigners could not be entitled to greater privileges than subjects, and (2) that they must submit to the law of the land,[5] both of which were disputed by the British Government.[6]

In 1853 the Rev. Jonas King, an American citizen, complained of the action of the Greek Government on account of (1) the appropriation of his land to public purposes, and (2) his trial and banishment for alleged offences against the established religion of the state. The Government of the United States declined to take action in regard to (2), but sent their Minister to Turkey, Mr. Marsh, to Greece with instructions to demand compensation for the expropriation. The Greek Government appear to have readily agreed to this course in principle, and

[1] *State Papers*, Vol. 30, 1841–2, p. 111.
[2] *Ibid.*, pp. 114–20.
[3] See, e. g., *State Papers*, Vol. 29, p. 197.
[4] See, e. g., *ibid.*, Vol. 28, pp. 1183, 1221.
[5] *Ibid.*, pp. 1214–15.
[6] *Ibid.*, pp. 1218–20.

after some negotiation as to the amount due, paid the sum of $25,000, which Mr. King himself regarded as satisfactory.[1] This case does not appear to be one where it was claimed to deprive an individual of compensation for his property by law—apparently it was a question rather of delay and evasion on the part of the Greek authorities—but nevertheless the incident has some relevance as showing that the confiscation of an alien's property gives rise, in itself, to a claim by his state to equitable compensation.

The next case to be noticed is that of the Delagoa Bay Railway, which formed the subject of arbitration proceedings in 1900 between the United States and Great Britain on the one hand and Portugal on the other. The facts were somewhat complicated, but so far as material for the present purpose they may be briefly outlined as follows:[2] Col. MacMurdo, an American citizen, obtained from the Portuguese Government in 1883 a concession for a railway from Lourenço Marques to the Transvaal Frontier, including the grant of the lands necessary for that purpose. MacMurdo transferred his concession to a Portuguese company in return for fully paid shares and cash, and the rights of this company were in turn acquired by an English company registered in London. In the course of time a portion of the line was built, but, owing to a number of intricate circumstances which it is not necessary to go into, on June 25, 1889, the Portuguese Government issued a decree cancelling the concession and ordering the taking possession of the whole enterprise, in pursuance of which the railway was seized. Thereupon the British and American Governments took the matter up and on September 10, 1889, Lord Salisbury addressed a note to the Portuguese Government which contained the following passages:

"The question at issue is not the motive but the justice of the seizure. Her Majesty's Government are of opinion that the Portuguese Government had no right to cancel the concession, nor to forfeit the line already constructed. . . . In their judgment, the British investors have suffered a grievous wrong in consequence of the possible confiscation by the Portuguese Government of the line and the materials belonging to the British Company . . . and for that wrong Her Majesty's Government are bound to ask for compensation from the Government of Portugal. . . . If the Portuguese Government admit their liability to compensate the British Company for an injury to which their interests or property have been subjected by the confiscation of the line and the seizure of the

[1] See Moore's *Digest*, Vol. VI, pp. 262–4.

[2] See *Sentence finale du Tribunal Arbitral de Delagoa*, Berne, 1900.

materials upon it, Her Majesty's Government will admit that the amount of that compensation is a proper matter for arbitration." [1]

A similar protest was made by the United States Government in a note dated November 8, 1889,[2] and after some negotiation the Portuguese Government admitted its liability to pay compensation and an arbitral tribunal was set up in Switzerland to fix the amount. The *compromis* dated June 13, 1891, makes it quite clear that the principle of compensation was conceded, Art. I stating that

" le mandat que les trois gouvernements sont convenus de confier au Tribunal arbitral est de fixer, comme il jugera le plus juste, le montant de la compensation due par le gouvernement portugais aux ayants droit des deux autres pays par suite de la rescission de la concession du chemin de fer de Lourenço Marques et de la prise de possession de ce chemin de fer par le gouvernement portugais, et de trancher ainsi le différend existant entre les trois gouvernements." [3]

In the result a sum of about 15½ millions of francs was awarded as compensation to be distributed proportionally among the shareholders of the English Company, including the widow of the original concessionnaire, Col. MacMurdo.[4]

Attention may be called to the following points upon this case: (1) although primarily a claim in respect of the breach of concessionary (i. e. contractual) rights, the seizure and confiscation of property was put in the forefront of the British and American protests; (2) the obligation of Portugal to indemnify the owners in respect of the seizure of specific property is recognized; (3) on the other hand, the " cause of action " was not a law of general application, but an administrative decree—no doubt perfectly valid in itself—directed against a particular undertaking.

The next case to be noticed is that of the Italian Life Insurance Monopoly. In 1911 a bill was laid before the Italian Chamber providing for the creation of a National Institute to which the entire life insurance business of the country was to be entrusted, and that no compensation could be claimed by existing insurance companies for pecuniary damage which they might suffer from the operation of this law. Protests were made by the Austro-Hungarian, French, German, and United States Governments, and H.M. Government addressed a Note to the Italian Govern-

[1] *State Papers*, Vol. 81, 1888–9, p. 691.
[2] Moore's *International Arbitrations*, Vol. II, pp. 1866–70.
[3] See *Sentence finale du Tribunal Arbitral de Delagoa*, p. 89.
[4] *Ibid.*, p. 199.

ment in which it was claimed that compensation ought to be provided for British insurance companies in respect of the loss which would be entailed, *inter alia*, by the compulsory disposal of valuable property for which they would have no further use, inasmuch as expropriation was universally recognized as constituting a title to compensation. In consequence, it may be presumed, of these protests certain amendments were introduced into the original Bill, of which the most important was the authorization for foreign insurance companies to continue business for ten years on certain conditions, and the Bill as amended became law in 1912. Formal reservations were made by the British Government, but it is to be observed that the Italian Government pointed out that as regards real property held by the foreign companies no loss was likely to result in view of the general appreciation in value of such property. "In connexion with this case it will be noticed that the "expropriation" in so far as specific property was concerned, was merely an indirect effect of the prohibition to continue business, and that an opportunity was in fact afforded to the owners of disposing of their property in fair conditions."

The last case to which reference will be made is the important one of the Portuguese Religious Properties. After the revolution of 1910 the Provisional Government of the Republic enacted a law, dated October 8, 1910, whereby all the property of the religious associations in Portugal was confiscated to the state. The British, French, and Spanish Governments protested on behalf of their nationals affected by this law and ultimately it was agreed to submit their claims to arbitration. The *compromis*, dated July 31, 1913, provides:

Art. 1: "Un tribunal arbitral, composé comme il est dit ci-après, est chargé de statuer sur les réclamations relatives aux biens des nationaux britanniques, espagnols et français saisis par le Gouvernement de la République portugaise à la suite de la proclamation de la république . . ." Art. 3: "Le tribunal examinera et réglera lesdites réclamations d'après le droit conventionnel éventuellement applicable, et, à défaut, d'après les dispositions et les principes généraux du droit et de l'équité."

It is clear, therefore, that the questions whether there had been any breach of international law, and, if so, whether compensation was payable, were left entirely open for decision. It is important to observe that in the course of the arbitral proceedings there is no mention of, or reliance upon, treaty engagements. In the

" Observations générales " presented by H.M. Government to the Tribunal, emphasis is laid upon the fact that the confiscatory measure contravened the acquired rights and expropriated the property of foreigners who had established themselves in the country on the faith of a legal system guaranteeing protection in these respects. The following passages may be cited :

" The Government of His Britannic Majesty do not in any way intend to constitute themselves judges of the legality or validity, from the point of view of the internal law of Portugal, of the acts of the Portuguese Government. That is a matter of internal politics with which they have no concern. But His Majesty's Government are of opinion that the Portuguese State in taking possession, as it has done, of property legally acquired by British nationals in conformity with the legislation of Portugal and under the cover and protection of its public and private law, has acted *contrary to the principles of the law of nations* which governs the relations between states. It is part of the generally recognized principles of international law that foreigners are subject to the laws of police and security of the state upon the territory of which they find themselves, and that the laws of that state also govern the rights of immovable property which they acquire there. In return for this subjection, foreigners are entitled to count upon the legal protection and guarantees under the cover of which they came into the country and acquired their rights."

" Respect of property, respect of acquired rights, these are the legal principles of all civilized countries. It is upon the security which they assure and the confidence they inspire that the relations entertained by nations with each other are based. It cannot be objected here that it is ill founded for a foreigner to complain of the measures applied to him when those measures are equally applicable to the nationals of the state on the territory of which he finds himself ; the position in the two cases is not the same. Foreigners neither have nor had in Portugal the enjoyment of political rights ; they neither have nor had any part in the public affairs of the country. When the nation demands, or lets its Government take, such and such a political measure, it has no right to complain. As a celebrated Portuguese jurist said : ' It is the nation's own act ; but the foreigner who had no part therein, cannot be placed upon the same footing.' Finally, it will be observed that if the Portuguese Government had alleged that the dispossessions were due to *force majeure* riots or civil war, there might be a question as to whether and what responsibility they incurred. But that is not the case here. The Portuguese State either took action itself, or else covered the spoliations complained of with its authority ; it has, itself, voluntarily assumed the responsibility." [1]

The other Governments associated with Great Britain as " plaintiffs " presented similar observations. To these arguments, the relevancy of which to the subject of the present article is obvious, what was the answer of the Portuguese Government ? In their " Observations générales " they say this : " The Govern-

[1] The above quotations are the writer's translation of the original French.

ment of the Portuguese Republic reply that far from contesting the legal principles upon which the three Governments base these arguments, they approve them without reserve, respectful of law and equity." [1] The defence of the Portuguese Government was founded upon a different consideration: viz., that the properties did not belong to the individual claimants but to their religious associations, and ultimately the case was settled and judgment given by consent; but this does not affect the value of the case as a precedent in view of the arguments put forward on the one side and accepted by the other.

Having considered the question from the point of view of authority it may be well to return to the actual matter under discussion, namely, the agrarian legislation referred to at the beginning of this article. It is plain that if this legislation were contrary to express treaty stipulations the soundness of a claim by the state whose subjects were affected would be incontrovertible. In old days the treaties between European Powers used to contain elaborate clauses for the purpose of assuring to their respective subjects the right of acquiring, enjoying, and disposing of various kinds of property in each other's dominions. One example of a provision of this nature has been noticed in connexion with the case of the Sicilian Sulphur Monopoly, but an examination of seventeenth- and eighteenth-century treaties reveals a great variety of stipulations, either general, or directed to exclude a particular municipal rule, such as the *droit d'aubaine*. In their relations with semi-barbarous countries it is still customary for civilized states to make express treaty provision for the protection and inviolability of their subjects' property, but in their treaties with one another the advanced nations have abandoned this course. Why? Surely not because it is intended to diminish the protection of subjects in foreign civilized countries, but because such express stipulations have become unnecessary by reason of the universal recognition and adoption in these countries of certain legal principles.[1] Among these principles is the right of aliens to possess and deal with property, including land, and the inviolability of such property in the sense that ex-

[1] An instructive illustration is afforded by the abolition of the *droit d'aubaine* in France in 1819, after which the series of treaties excluding the operation of this right fell into abeyance, and were not renewed because unnecessary. See De Martens and De Cussy's *Recueil des Traités*, Vol. I, pp. xvii–xxii.

propriation is only permissible for public purposes and then only on payment of full compensation by the state.) This situation is well expressed by the British observations in the Portuguese Religious Properties arbitration cited above. Foreigners establish themselves in a given European country upon the faith of a known system of law and civilization, and it does not lie with that country, even if it be recently erected into an independent state, to alter that system to their detriment and then to say: this is legislation of general application; neither you nor your Government are entitled to complain or interfere.

On the other hand, it is indisputable that full scope is allowed under international law to the internal organization of the state for the purpose of securing its progress and well being—or what the competent authorities regard as such—and that foreign states are not in general entitled to intervene even if the measures taken are prejudicial to their subjects. The problem is to reconcile the two principles. It is submitted that the solution may perhaps be found in applying this test:—does the measure in dispute substantially violate a legal principle accepted by the society of civilized states as a whole, so that the detriment caused to the individuals concerned can be regarded as a breach of a binding obligation, or to put it in another way, as a breach of international law?

It may be said: what is the distinction between the expropriation of land involving the confiscation of part of its value, and a capital levy, or even death duties such as are imposed in England? The answer is that it is a question of degree. There might be a capital tax so high in rate as to be contrary to international law as interpreted above; on the other hand, the rate might be such as to render the impost indistinguishable in essence from a tax on income. The question in each case would be: is this, in substance and in fact, confiscation? And, further, it may well be that a distinction is to be drawn between a tax upon property in general and the expropriation of specific property, especially land.

The conclusion to which the writer has arrived, and which he ventures, not without diffidence, to submit as a humble contribution to this difficult subject, is that if a claim were referred to judicial settlement by an international court in respect of the expropriation of a foreigner's land under the legislation described at the beginning of this article, the plaintiff state

would have a reasonable prospect of success if one of two conditions were fulfilled and proved: (1) that there had been discrimination against its subject as compared with natives in the application of the legislation, *or* (2) that no compensation was given in respect of the expropriation, or if there was compensation, that it was so inadequate as to involve a substantial degree of confiscation.

THE HAGUE ACADEMY OF INTERNATIONAL LAW

AN AID TO THE DIFFUSION AND TO A CLEARER NOTION OF THE LAW OF NATIONS

By E. N. VAN KLEFFENS.

In the years preceding the war, when three decades of peace in the greater part of Europe had increased prosperity, and war seemed a threat to many vested interests, the larger, though, as proved by events, not the more influential section of the world had come to look at international tranquillity as a thing worth keeping. As the disquieting possibility of an armed conflict between the great powers darkened the political horizon, the attention of many was continually being directed to the advantages of peace, and the means of preserving it. The possibility of war was a menace dreaded by most thoughtful people, "a world," as Mr. Churchill picturesquely says,[1] "at one moment utterly fantastic, at the next seeming about to leap into reality —a world of monstrous shadows moving in convulsive combinations through vistas of fathomless catastrophe," and many forces were nervously working in an attempt to save and strengthen peace. It was this atmosphere of tension and anxiety before the threatening storm that generated the current of internationalism which made itself felt in the years before 1914, both in the official world—as, for instance, through The Hague Peace Conferences—and in unofficial circles—as exemplified by the meritorious, but occasionally somewhat frenzied activities of the pacifists.

In this supreme effort to obtain respect for the settled order of things great stress was naturally being laid on the importance of international law as the surest standard according to which the true extent of the rights and duties of nations could be determined without recourse to war. The study and development of international law thus became the important corollary of the various international agencies (such as arbitration treaties, the Permanent Court of Arbitration, the Bryan conventions) which before the war were set up for the preservation of peace through a peaceful

[1] *The World Crisis*, 1911–14, Vol. I, p. 24.

settlement of international disputes. Was it surprising that in those days, when conferences were being held at which international law was to be stated, and courts and commissions set up to administer it, there should be evolved a plan to create an international centre where it was to be taught ?

Like any other institution, the centre that was created, and which is commonly known as The Hague Academy of International Law, cannot be properly described without some reference to those whose ideas shaped and pervaded it. A few observations may therefore well be made in this respect. It was not the fruit of any one mind. For that, seen in its historic setting, the Academy was perhaps too much in the natural and logical order of things. Von Bar advocated it in Germany in 1900. Seven years later the Swiss lawyer Nippold, and Fleischer, editor of the *Deutsche Revue*, again put forth a tentative plan. It received official sanction at the Second Peace Conference at The Hague, where a more definite plan was presented by M. Sturdsa, Rumanian Minister for Foreign Affairs. From that moment the idea was not abandoned ; there is evidence that, between 1907 and 1911, it was fermenting in many minds, especially in that of the Dutch lawyer and statesman the late M. Asser, who by the end of 1910 set on foot an influential special committee of representative Dutch jurists, and in that of Dr. James Brown Scott, who, as readers of this Year Book know, is Secretary-General of the Carnegie Endowment for International Peace in Washington, and Director of its international law division. Their combined energies and efforts were supported by many leading lawyers from various countries ; amongst the earlier British supporters, the late Lords Alverstone, Reay, and Courtney of Penwith, and Sir Edward Fry may be mentioned. Under the auspices of the Institute of International Law these efforts resulted, in the beginning of 1914, in the foundation of the Academy of International Law at The Hague, established with the aid of the Carnegie Endowment for International Peace, which promised a generous subvention.

The plan which was evolved took the form of a scheme to arrange courses of lectures to be delivered by eminent scholars and practitioners in international law. They were to be held during the summer months in the Palace of Peace at The Hague, renowned for the serenity of its political atmosphere. Stress was laid on impartial and scholarly treatment of the subject-matter.

In the words of the Statutes under which the Academy was incorporated, it was

> " constituted as a centre of higher studies in international law (public and private) and cognate sciences, in order to facilitate a thorough and impartial examination of questions bearing on international juridical relations.—To this end, the most competent men of the various states will be invited to teach, through regular courses and lectures, or in seminaries, the most important questions, from the point of view of theory and practice, of international legislation and jurisprudence, as they arise *inter alia* from deliberations of the conferences, and arbitral awards."

The Academy was to be inaugurated in the autumn of 1914, under the patronage of the Netherlands Government, which had promised to invite all other Governments to be represented at the ceremony. But instead of a new impetus to the study of international law, the second half of that year witnessed an upheaval which shook the established law and order to its foundations. For a number of years interest and, above all, such faith as had existed before in the value of the law of nations, suffered a very serious setback, and the possibility of inaugurating the Academy at The Hague temporarily disappeared.

During and towards the end of the war the avowed principles of the allied and associated powers, widely proclaimed, which laid so much stress on international justice, the appeal of the vanquished nations to the same principles, and the experience of the neutrals, seeking refuge in legal argument from the reproach of partiality, had kept the notion of international law alive. At the close of the war, if faith in it had been severely shaken, its potential utility as a mainstay of international society was perhaps more clearly felt and realized than before 1914. The certainty that recurrent arbitrary use of force on a large scale might well destroy our civilization drew attention to the great importance of international law as one of the principal safeguards against future cataclysm. The preamble to the Covenant of the League of Nations, inserted in four of the five great peace-settlements, is explicit testimony of this conviction ; the prompt institution of the Permanent Court of International Justice, together with the establishment of the League, is weighty evidence. And naturally the idea of a centre where the nations of the world might co-operate in the teaching of international law reappeared.

It was in the course of the preparatory work in connexion

with the establishment of the Permanent Court of International Justice that this idea first found authoritative expression after the war. The international advisory committee of jurists to whom that work had been entrusted, and of which Lord Phillimore was the British member, felt the need of a centre of the nature just referred to. Assembled as they were at The Hague in the same Palace of Peace that prior to the war had been selected as the seat of the Academy of International Law, they had no difficulty in recalling to memory the existence of that institution which, though incorporated, had never functioned. On July 24, 1920, the commission unanimously adopted a resolution, reading as follows :

" The Advisory Committee of Jurists assembled at The Hague to prepare the constituent Statute of a Permanent Court of International Justice ;

" Gladly takes this opportunity of recording a wish that the Academy of International Law, founded at The Hague in 1913, and of which the work has been suspended owing to circumstances, may be set in operation in as near a future as possible, side by side with the Permanent Court of International Justice and the Permanent Court of Arbitration, at the Peace Palace at The Hague."

No doubt this signal was a strong incentive to the survivors among those who had established the Academy in 1913–14 to take steps in order to put the existing machinery into motion. The available members of the Curatorium, constituted in 1914, met in 1922 ; new members (amongst others Lord Phillimore) were elected in the room of those deceased, and plans were made to commence work in the summer of the following year. Courses of lectures were organized, and the active support of the Netherlands Government was sought and obtained in arousing the interest of the other Governments. On July 14, 1923, the Academy was solemnly inaugurated in the Palace of Peace at The Hague, in the presence of a large and brilliant gathering. The number of nations whose diplomatic representatives were present proved the widespread interest aroused by the event. Several of them also sent a proportion of their younger civil servants belonging to various branches of the administration to attend the courses of lectures, which started immediately.

The 1923 term of instruction, consisting of two periods of three weeks each, met with a considerable measure of success, greater, in fact, than the most sanguine promoters of the Academy had anticipated : 353 students registered. The second term,

held in the summer of 1924, far from marking a lapse of interest in what was then no longer a novelty, showed increased activity. But before going into further details with regard to the nature and the results of the courses of lectures, a few words may well be said concerning the constitution of the Academy.

The Academy is governed by an Administrative Council and a Curatorium. The Council looks after the general interests of the Academy, chief amongst which is the administration of its finances. The Council, aided by the treasurer, prepares the budget. The chairman, assisted by the secretary, does the current work between the meetings of the Council.

The Curatorium organizes and superintends the courses of instruction; to it the scientific organization is entrusted. Its mission is both difficult and delicate, embracing, as it does, the selection of professors and of the subjects to be treated, the preparation of the schedule of lectures, &c. It has a quasi-permanent executive committee, consisting of the president, vice-president, and the secretary of the Curatorium.

Membership of the Administrative Council is vested in the five Dutch directors of the Carnegie Foundation at The Hague who, in this latter capacity, are the wardens of the Palace of Peace and its appurtenances, including the famous library of international law, which is perhaps the most complete of its kind. This combination of offices ensures very effectively the good relations which necessarily must exist between the authorities of the Academy and of its seat, the Palace of Peace.

In addition to the Administrative Council and the Curatorium, there is a Financial Committee of three members, who control the Council's administration of revenue and expenditure. M. Loder, judge and hitherto president of the Permanent Court of International Justice, is one of its members.

Besides the secretaries of the Council and of the Curatorium the Academy has a Secretary-general who supervises and co-ordinates the secretarial work of both bodies. The present holder of this office is Baron Albéric Rolin, also a well-known name in the world of international law, were it only as honorary president of the Institute of International Law.

The Curatorium consists of twelve members. Care has been taken to ensure the impartiality which it should possess, since the scientific direction is entrusted to it, by laying down the rule that not more than one subject or citizen of any one country

can be a member of it. Amongst the members there is always the director of the division of international law of the Carnegie Endowment for International Peace (at present Dr. Brown Scott) and a Netherlands member (at present M. Heemskerk), nominated by the Administrative Council.

Its present British member is Lord Phillimore who, as mentioned above, was one of the members of the committee of jurists which framed the draft statute of the Permanent Court of International Justice, and in 1920 recommended the putting into operation at an early date of the Academy. Amongst the other members there are, apart from those of American and Dutch nationality to whom reference has been made, an Austrian (M. Strisower), a Belgian (Baron Descamps), a Chilian (M. Alvarez), a Frenchman (M. Lyon-Caen, who is the Chairman), a German (Herr Schücking), a Greek (M. Politis, Vice-Chairman), an Italian (M. Anzilotti), a Russian (Baron Taube), and a Swede (M. de Hammarskjöld). It will be observed that these are all well-known names in the domain of international law, a circumstance which testifies to the fact that the Academy is an undertaking, directed not only by serious and responsible men, but by twelve of the foremost legal minds of the world. The distinguished jurists who lectured at the Academy added to its budding prestige.

One of the most difficult problems the initiators of the Academy found themselves confronted with was the question of its finances.

A certain capital sum, needed for its incorporation under the laws of the Netherlands, was given to the Academy by M. Asser out of the Nobel Prize he received in 1911, and was supplemented by a donation from another Dutchman, the late M. Goekoop. The revenues from this initial capital were, however, far from sufficient to meet the estimated expenses. What was to be done ?

Financial ties create obligations. It was clear therefore that there could be no appeal to any one state or group of states for pecuniary support ; for it was realized that the Academy would have to be able to give guarantees of possessing that impartiality which alone befits a truly scientific international body dealing with international questions, and that support to which political motive might be ascribed would do away with any such guarantee. Private subsidies seemed the only solution. Fortunately for the

cause served by the Academy, the question how to obtain them was conclusively answered by the Carnegie Endowment for International Peace in Washington, which, as stated before, promised a very generous subvention. Since the Endowment is, by its very organization, exempt from political influences, this difficult problem thus found the happiest possible solution. A great debt of gratitude is due to this enlightened American institution for its ready and effective action.

Much thought has been given to the organization of the courses of instruction, both before and after the inauguration of the Academy in 1923. With regard to the time of year in which the lectures are held, the period between the middle of July and the middle of September has been recognized as being the most suitable, as it coincides with the holidays of by far the greater number of the Academy's professors and students. Inasmuch as in the majority of cases it was hardly probable that visitors would remain throughout this entire term of twice four weeks, the schedule of lectures is so arranged that an important part of international law is treated during each period of four weeks, periods long enough to allow subjects drawn from most branches of the science to be studied. This ensures two interesting and comprehensive programmes every summer. Thus, in 1924, the history of international law was given consideration in the first, as well as in the second month of instruction, the history until the seventeenth century being considered in the former, and the development of international law from the seventeenth century onwards being treated in the latter. Similarly, under the general sub-heading of " the principles of public international law," a series of lectures was given in the first month on " the structure of the community of nations," and in the second on " the fundamental rules of international intercourse." In the same way, lectures were given in both months on various aspects of the principles of private international law, capita selecta of private international law, international jurisprudence, the peaceable settlement of international disputes, international law in connexion with finance (embracing questions such as frequently arise out of external state loans), and other topics. The League of Nations, mandates and other chapters of international law of recent origin were not forgotten. Hitherto, owing to the recent memories of the world conflagration, the " law of war " has not been included in the Academy's syllabus.

The courses of lectures are of varying length, ranging, according to the importance and scope of the theme, from three to twelve hours. Every day (Saturdays and Sundays excepted) four lectures, of an hour's duration each, are given, two in the morning, and two in the afternoon.

No fees whatsoever are being charged, with the sole exception of an insignificant amount for the delivery of a certificate which those who regularly attend the lectures during either period of four weeks can obtain on application.

The general rule is that the lectures are given in French. The linguistic problem for such an institution as the Academy is of course a difficult one, and it is questionable whether one, two, or more languages should be admitted. The adoption of official languages is always a thorny and delicate problem, and the question cannot be answered in the same way for every institution in connexion with which it presents itself. Hitherto, considerations mainly of a practical nature have militated in favour of the retention of the rule that French should be the working language of the Academy.

In order to make the lessons as accessible and fruitful as possible, abstracts of the lectures are distributed to students in advance, with all necessary references. This has proved to be a valuable aid to students. As a general rule, all lectures are to be published some time after their delivery, the publishers being the well-known firm of Hachette, in Paris.

In 1924 courses of instruction were given, on the subjects indicated above, by 26 lecturers, of whom 2 were Americans, 2 Belgians, 3 British, 1 Czecho-slovak, 1 Dutchman, 6 Frenchmen, 3 Germans, 1 Greek, 2 Italians, 2 Swiss, 2 Russians, and 1 Venezuelan, all of them lawyers of repute. The British lecturers were Sir John F. Williams, C.B.E., K.C., British Legal Adviser to the Reparation Commission; Mr. Hugh H. L. Bellot, D.C.L., Hon. General Secretary of the International Law Association, and Mr. R. E. L. Vaughan Williams, K.C., Member of the Anglo-German Mixed Arbitral Tribunal.

In the previous year, Lord Phillimore was amongst those who honoured the Academy with their active co-operation.

It has already been mentioned that the number of students who registered in 1923 was very satisfactory, amounting, as it did, to 353. In 1924 it reached the total of 368. In that year the average number of students present at a lecture was 66.

It was pleasant and encouraging to see that 104 students of 1923 had come back. As is only natural, in view of the fact that the Academy is in Holland, a considerable contingent of the students (208) was of Netherlands nationality, the others being

28 German	3 Italian
17 American	3 Siamese
12 Czecho-slovak	2 Argentinian
10 British (U. K.)	1 South-African
9 Belgian	1 Bulgarian
9 French	1 Danish
8 Chinese	1 Esthonian
8 Cuban	1 Indian
8 Hungarian	1 Irish
8 Polish	1 from Panama
5 Greek	1 Rumanian
5 Swiss	1 from Salvador
4 Japanese	1 Spanish
4 Mexican	1 Turkish
3 Finnish	

Thirty states were thus represented. There were 49 lady students.

It is interesting to note that, as in 1923, about 70 per cent. of the students had completed their university education and were engaged in professional work. This means that the Academy's audiences have a character of their own, and differ from those which are habitually found in university lecture rooms. The Academy evidently appeals to a wider circle of men and women than university students only.

There were, amongst the students, 122 lawyers, and 120 civil servants and naval and military officers. Of the civil servants, 57 belonged to the diplomatic and consular services. Sixty-eight persons received the certificate delivered by the Academy for regular attendance during the term.

From the very outset, and long before the Academy got to work, those responsible for it realized that, in order to ensure the best results, the support of the various Governments would be of very great importance. It has been mentioned that financially the Academy, with the exception of a small income derived from its initial capital, looks towards the Carnegie Endowment for International Peace for maintenance. By its own independence, the Endowment guarantees the independence of the Academy from political influences, a fact of the greatest impor-

tance for its entire position and the confidence it is able to inspire. But if the Governments have never been asked to contribute towards the Academy's expenses, their support, manifested in other ways, has always been sought by the Academy. This support can be given in various ways. Scholarships, for instance, can be established by the various Governments for their nationals ; or they may enable a certain number of their younger civil servants (more especially younger diplomatic and consular officers), officers in the naval and military staff-colleges and others, to go to The Hague for a month or longer. Even a mere recommendation or encouragement to such men to visit the Academy would have a stimulating effect. And it should not be forgotten that, if the Academy seeks the support of the Governments in these various ways, whereby its freedom from political bias is not impaired, it does not do so for its own sake, but for the sake of those who are interested in the study of international law, and in order to disseminate a better understanding of that science. It is recorded that various Governments, recognizing the usefulness of the Academy, have generously lent their support. The names of Belgium, China, Czecho-slovakia, Denmark, France, Germany, Japan, Norway, Panama, Poland, and Siam may be mentioned in this connexion. It is hoped that other countries will not hesitate to follow their example. It should be added that a number of diplomatic and consular officers of various nations, residing in Holland or elsewhere, attend lectures at the Academy.

In this connexion, mention should be made of a step taken by the Government of the Netherlands. With the intention of repeating this step every year until further order, this Government presented a bill to the States-General which was duly enacted, placing a sum of two thousand florins at the disposal of the Curatorium of the Academy in order to defray the cost of five scholarships, of four hundred florins each ; these scholarships are to be awarded by the Curatorium to five persons, of other than Netherlands nationality, desirous of visiting the Academy, who in the twelvemonth preceding the first of May of a given year have published the book, essay, article, or other work which, in the opinion of the Curatorium, is the most deserving. Detailed rules for the way in which these scholarships are to be awarded are in course of preparation.

Private generosity is also contributing towards the same end.

A scholarship has been instituted by M. de Bustamante, judge of the Permanent Court of International Justice.

The Academy's statutes permit the institution of scholarships out of its own funds. It is probable that in 1926 such scholarships will be established.

Various measures have been taken in order to supply information to—and make arrangements for—those who intend to come to the Academy, and to curtail the expenses which a stay at The Hague naturally involves. This important side of the Academy's management has been successfully entrusted to a voluntary organization of the students, called the " Association des Auditeurs et Anciens Auditeurs de l'Académie de Droit International de La Haye." This Association performs a variety of duties. It is the link between the students on the one side, and the professors and officials of the Academy on the other. When the students desire to make suggestions, the Association is their authorized mouthpiece. It tries to remain in contact with those who have visited the Academy, thus consolidating the circle of its friends. Its permanent bureau, established in the Palace of Peace, extends all desired information to prospective students. Very naturally, the Association also looks after their material interests. The permanent bureau makes arrangements with hotels, lodging-houses, and private families, organizes dinners taken in common, often with the professors; it introduces foreign students to good lawn-tennis or golf clubs, &c. In 1924, the Association arranged for a considerable number of professors and students to stay at the same hotel at greatly reduced terms. The Association also installed a refectory at the Palace of Peace. Partly owing to these various measures, the cost of a stay at The Hague need be no higher than the average cost of living in a European capital for the same time.

There remains an important question to be answered. It may be contended, that it is all very well to say, as was said in the beginning of this article, that a closer study of international law was in the nature of things; and that the Academy was more or less, to use a big word, an historical necessity. But does it really follow, that in order to provide the best means for the promotion of that study, it was necessary to create an international institution? Could not the existing, or, if need be, new professorships in that branch of the law in the individual universities of the various countries suffice, or be made to suffice?

The answer seems to be, that it is quite true that those who occupy the chair of international law in the individual universities of the various countries can to a considerable extent cope with the existing desire for instruction in the rules and doctrines of international law. They also have the advantage of working with their pupils during a much longer period than the terms of The Hague Academy. But, on the other hand, it is also true that each of those professors has only one body and one mind, that their energies and the field of their activity are limited, that international law is too diverse and too complex to allow any individual to be a specialist in all its parts, or even in its more important sub-headings. To glance through any catalogue of a somewhat large library of international law is to learn that many a man or woman may have a general knowledge of the subject, but that he or she can rarely attain to expert knowledge of more than a few of its sub-divisions. It is only by a judicious selection of experts on various topics, that a body of men can be brought together who jointly can do full justice to the whole, or rather to an important section of the whole. No individual university professor can attempt to do this ; The Hague Academy of International Law, on the other hand, not only can do it, but does it. The point becomes of all the more interest, when one thinks how much, or perhaps better, how little, of the best instruction is actually absorbed, digested and retained by its recipients. In order to make that quantity as large as possible, instruction cannot be too good, and in so far as the teaching of international law is concerned, the methods of The Hague Academy with its numerous experts ensure results that can hardly be expected from one or a small number of professors in individual universities. Whatever their ideas may be in this connexion, most people will agree that instruction in international law at individual national universities and at The Hague Academy supplement each other in a most happy fashion. And if this is perhaps the chief *raison d'être* of The Hague Academy, other advantages are not to be overlooked. Much could be said of the importance and usefulness of exponents of divergent points of view on various problems of international law lecturing to the same audience, and perhaps meeting where they lecture ; this interchange of ideas may contribute to arriving at a consensus of opinion where dissension prevails. It also is interesting that amongst those who are invited to teach at The Hague are to be

found, not only theorists, but many practicians. The programme for 1925, appended to the present article, shows this clearly.

Events, then, have shown the Academy to be in the natural order of things; its promoters have ensured its freedom from national bias and its non-political character. For the teaching of international law it can do what is beyond the reach of national agencies of education, whose important natural complement it may well be called. The results having so far been entirely satisfactory, its future may therefore be awaited with confidence. Various British lawyers of note have lectured within its walls, and a number of British students have attended the courses of instruction. The Academy hopes that it may see them come in ever-increasing numbers, not for its own sake, but because only thus can it be for them what it endeavours to be for others as well: an aid to the diffusion and to a clearer notion of the law of nations.

THE HAGUE, *February*, 1925.

SCHEDULE OF LECTURES TO BE DELIVERED AT THE ACADEMY OF INTERNATIONAL LAW AT THE HAGUE IN 1925

FIRST PERIOD: JULY 13—AUGUST 7, 1925

DÉVELOPPEMENT HISTORIQUE DU DROIT INTERNATIONAL.

LE DÉVELOPPEMENT HISTORIQUE DU DROIT INTERNATIONAL DEPUIS GROTIUS (8 leçons).—M. Van der Vlugt, ancien Professeur et Doyen de la Faculté de Droit de l'Université de Leyde.

L'INFLUENCE DE LA RÉFORME SUR LE DÉVELOPPEMENT DU DROIT INTERNATIONAL (4 leçons).—M. Boegner, Pasteur de l'Église réformée.

PRINCIPES DU DROIT INTERNATIONAL PUBLIC.

LA CODIFICATION DU DROIT INTERNATIONAL (12 leçons).—M. Ch. de Visscher, Professeur à l'Université de Gand.

PRINCIPES DU DROIT INTERNATIONAL PRIVÉ.

THÉORIE GÉNÉRALE DE L'ORDRE PUBLIC (6 leçons).—M. Thomas H. Healy, Assistant Dean of the School of Foreign Service, Georgetown.

MATIÈRES SPÉCIALES DE DROIT INTERNATIONAL PRIVÉ.

EFFETS ET EXÉCUTION DES JUGEMENTS ÉTRANGERS (6 leçons).—M. P. Poullet, Sénateur, Professeur à l'Université de Louvain.

DROIT ADMINISTRATIF INTERNATIONAL.

THÉORIE GÉNÉRALE DES UNIONS INTERNATIONALES (6 leçons).—M. le Comte M. Rostworowski, Professeur à l'Université de Cracovie.

DROIT COMMERCIAL ET ÉCONOMIQUE INTERNATIONAL.

LES EFFETS DE COMMERCE EN DROIT INTERNATIONAL (6 leçons).—M. Arthur K. Kuhn, Membre du Barreau américain.

DROIT FINANCIER INTERNATIONAL.

LA GARANTIE D'ÉTAT EN MATIÈRE FINANCIÈRE (6 leçons).—M. G. Jèze, Professeur à l'Université de Paris.

DROIT PÉNAL INTERNATIONAL.

L'EXTRADITION (6 leçons).—M. Al. Pilenco, ancien Professeur à l'Université de Saint-Pétersbourg.

ORGANISATION INTERNATIONALE.

LE PROTOCOLE DE GENÈVE (6 leçons).—M. Wehberg, Membre de l'Institut de Droit International, Rédacteur en chef de la *Friedenswarte*.

JURISPRUDENCE INTERNATIONALE.

IMMUNITÉS DES ÉTATS EN MATIÈRE DE JURIDICTION ET D'EXÉCUTION FORCÉE (6 leçons).—M. George Grenville Phillimore, Greffier de la Haute Cour de Justice à Londres.

PROBLÈMES AMÉRICAINS DE DROIT INTERNATIONAL.

LA SOLIDARITÉ INTERNATIONALE DANS L'AMÉRIQUE LATINE (6 leçons).—M. Guani, Membre du Conseil de la Société des Nations, Ministre de l'Uruguay à Bruxelles.

SECOND PERIOD: AUGUST 10—SEPTEMBER 4, 1925

DÉVELOPPEMENT HISTORIQUE DU DROIT INTERNATIONAL.

L'INFLUENCE DU CHRISTIANISME SUR LE DÉVELOPPEMENT DU DROIT INTERNATIONAL (6 leçons).—M. Georges Goyau, Membre de l'Académie française.

L'INFLUENCE DES IDÉES DE MACHIAVEL SUR LA DOCTRINE ET LA PRATIQUE DU DROIT DES GENS (6 leçons).—M. Charles Benoist, Membre de l'Institut de France.

PRINCIPES DU DROIT INTERNATIONAL PUBLIC.

LES DROITS ET LES DEVOIRS DES NATIONS (12 leçons).—M. Gilbert Gidel, Professeur à l'Université de Paris et à l'École des Sciences politiques.

PRINCIPES DU DROIT INTERNATIONAL PRIVÉ.

LA THÉORIE GÉNÉRALE DES DROITS ACQUIS (8 leçons).—M. A. Pillet, Professeur à l'Université de Paris.

MATIÈRES SPÉCIALES DE DROIT INTERNATIONAL PRIVÉ.

LES SUCCESSIONS EN DROIT INTERNATIONAL (6 leçons).—M. Hans Lewald, Professeur à l'Université de Francfort-sur-le-Main.

DROIT ADMINISTRATIF INTERNATIONAL.

LA COOPÉRATION INTELLECTUELLE (6 leçons).—M. Julien Luchaire, Inspecteur général de l'Instruction publique de France.

DROIT COMMERCIAL ET ÉCONOMIQUE INTERNATIONAL.

CONDITION JURIDIQUE DES NAVIRES DE COMMERCE (6 leçons).—M. P. Fedozzi, Professeur à l'Université de Gênes.

DROIT FINANCIER INTERNATIONAL.

L'INTERVENTION EN MATIÈRE FINANCIÈRE (6 leçons).—M. K. STRUPP, Professeur à l'Université de Francfort-sur-le-Main.

DROIT PÉNAL INTERNATIONAL.

LA JUSTICE PÉNALE INTERNATIONALE (6 leçons).—M. Saldana, Professeur à l'Université de Madrid.

ORGANISATION INTERNATIONALE.

LE PROBLÈME DES LIMITATIONS DE LA SOUVERAINETÉ ET SPÉCIALEMENT LA THÉORIE DE L'ABUS DU DROIT EN DROIT INTERNATIONAL (6 leçons).—M. N. Politis, Professeur honoraire à l'Université de Paris, Ministre de Grèce à Paris.

JURISPRUDENCE INTERNATIONALE.

LA COMPÉTENCE CONSULTATIVE DE LA COUR DE JUSTICE INTERNATIONALE (3 leçons).—M. Manley O. Hudson, Professeur à l'Université de Harvard.

PROBLÈMES DE DROIT INTERNATIONAL CONCERNANT L'ASIE OU L'AFRIQUE.

EXTERRITORIALITÉ ET QUESTIONS DE JURIDICTION EN EXTRÊME-ORIENT (6 leçons).—M. le Baron Heyking, ancien Consul général de Russie.

OBITUARY

SIR JOHN SALMOND

Sir John Salmond, Judge of the Supreme Court of New Zealand, and previously Solicitor-General of that Dominion, died on September 20, 1924, aged 62.

The son of a New Zealand father, he was born in England in 1862 and educated in New Zealand and at the University of London. Called to the New Zealand Bar in 1887, he was for a short time professor of law at the University of Adelaide. Later he became a King's Counsel and was appointed Solicitor-General, which in New Zealand is a permanent and not a political post. Subsequently he became a judge of the Supreme Court.

He will be remembered by lawyers in general as the author of books on jurisprudence and the law of torts which have taken their place as standard works, but of late years his greatest interest outside his judicial activities was perhaps the problems presented by the new status acquired by the self-governing Dominions during and since the war, and the problems, particularly in the region of foreign policy, resulting from that status. He was the leading exponent of the more conservative view which has usually been adopted by New Zealand, and it is well known that Mr. Massey was accustomed to rely largely on his advice when dealing with questions of this description.

In 1921 Sir John represented New Zealand at the Washington Conference on the Limitation of Armament. The appointment of a judge as a plenipotentiary to a conference of this description was perhaps something of an innovation, but was fully justified by the results, for he was qualified not only by his legal training but also by a considerable experience of international questions to play a very useful part in the deliberations of the conference, and his judgment was much relied upon by his colleagues at the frequent meetings of the British Empire Delegation. He held strongly the view that treaties, like Acts of Parliament, should have ' short titles ', and in the later stages of the conference, when it became apparent that several treaties would be signed at Washington on the same day, he endeavoured to induce the conference to adopt a series of such titles for the treaties in question, but was unable to overcome the more conservative views of his colleagues.

Sir John Salmond was among the first " foreign correspondents " of the *British Year Book of International Law* and continued to hold that position until his death.

NOTES

SUBMISSION OF TREATIES TO PARLIAMENT BEFORE RATIFICATION

THE Secretary of State for Foreign Affairs, in answer to a parliamentary question, announced in the House of Commons on December 15, 1924, that the Government did not intend to maintain the practice introduced by the Labour Government of submitting all treaties to Parliament before ratification.

The system adopted by the Labour Government was explained in the *British Year Book of International Law*, 1924, p. 190. While it was in force, all treaties concluded by the British Government were laid before Parliament twice over, once before and once after ratification. Henceforward they will in normal cases only be laid before Parliament once in the various numbers of the Treaty Series.

C.

NATURALIZATION OF GERMANS DOMICILED IN SOUTH-WEST AFRICA

THE Parliament of the Union of South Africa passed in September 1924 an Act entitled "The South-West Africa Naturalization of Aliens Act, 1924." The main object of this Act is to confer British nationality on Germans domiciled in the mandated territory of South-West Africa, subject to reservation of the right of any individual wishing to decline such nationality to do so within a stated period. This rather unusual piece of legislation has been passed in order to provide a solution for a problem of some delicacy which presented itself as a result of the special circumstances of the territory, and of the policy adopted with regard to it by the mandatory power.

Article 122 of the Treaty of Versailles provides that the government exercising authority over any territories which formed part of Germany's oversea possessions

> "may make such provision as it thinks fit with reference to the repatriation of German nationals and to the conditions upon which German subjects of European origin shall, or shall not, be allowed to reside, hold property, trade or exercise a profession in them,"

but makes no provision for a change in the national status of such Germans as may continue to reside in such territories.

The future status of native inhabitants of the former German oversea possessions is partly provided for by Article 127, which declares that such natives "shall be entitled to the diplomatic protection of the governments exercising authority over those territories"; but there is no corresponding provision with regard to Europeans.

The Government of the Union of South Africa, to which the mandate for

South-West Africa was entrusted, allowed the great majority of the German population of South-West Africa to remain in the territory. According to the census of the territory taken in 1921, the total European population amounted in that year to 19,432, and of these 7,855 were Germans.

The question of the national status of the members of this relatively large German community was obviously of critical importance, and the South African Government recognized at a very early stage that it would be impossible to lay down the lines on which the political development of the territory was to proceed until some settlement of this question had been reached.

The Union Parliament has, under the terms of the mandate, full powers of legislation for South-West Africa, and the question might conceivably have been dealt with by the mere application to the territory of the Naturalization Law of the Union of South Africa : it would then have been open to any individual German, who wished to become a British subject, to apply for naturalization in the ordinary way. But there were serious objections to the adoption of a plan which would have left this question of naturalization to be dealt with piecemeal on the initiative of each individual German resident, and which might in practice have yielded very little result. It was considered essential to secure a settlement which would apply to the community as a whole. A Commission, appointed in 1920 to advise the Union Government on various questions affecting the future of the territory, dealt with the question of citizenship from this point of view, and recommended that a law should be passed in such a form as to confer British citizenship automatically on Germans domiciled in the territory, without any application being required from individuals, subject to the reservation to each individual of the right to make within a stated period a declaration declining such citizenship.

General Smuts, then Prime Minister of the Union, while in favour of adopting this recommendation, considered it advisable that, before any such law was passed, the members of the German community should be fully consulted with a view to ensuring their acquiescence.

Meetings were accordingly held in South-West Africa at which the Administrator discussed the subject with German residents. The proposed plan of " automatic " naturalization met with some measure of support, but opposition also showed itself, and before proceeding further, General Smuts decided to seek the approval of the Council of the League of Nations for the course proposed, and also to obtain, if possible, the concurrence of the German Government.

In April, 1923, the proposal of the South African Government was formally submitted to the Council of the League, and the Council passed a resolution stating that it saw no objection to the action proposed.

In October, 1923, the matter was discussed in London between General Smuts and two representatives of the German Government, and, as a result of this discussion, a memorandum was drawn up and signed by both parties embodying a statement of the policy which the South African Government proposed to adopt in its dealings with the Germans of South-West Africa. This memorandum opened with the following declaration :

> " The policy of the Union Government is to accept the Germans of South-West Africa as part of the people with the same privileges and the same responsibilities as the other citizens."

The memorandum then proceeded to give assurances on various questions such as facilities for the use of the German language in official correspondence, the position of German schools, churches, and missions, and various questions of administrative detail. The question of immigration was dealt with as follows :

> " The immigration laws in force in the Union of South Africa shall apply to South-West Africa. Germans who conform to the provisions of this act (i. e. the Immigration Act) shall be welcome."

The memorandum concluded with the following paragraph on the subject of military service :

> " Germans in South-West Africa and their children will not be liable in any circumstances for military service against the German Reich for a period of thirty years from this date."

In a letter, addressed to General Smuts after the signature of this memorandum, Mr. De Haas of the German Foreign Office made the following declaration on behalf of his Government :

> " Recognizing that the future of South-West Africa is now bound up with the Union of South Africa, and that it would be a wise policy for the German nationals in that territory to throw in their lot with South Africans, the German Government are prepared to use their influence with these nationals to induce them to accept Union citizenship under a general naturalization law of the Union, and to advise them not to exercise their right of declaring themselves out of that citizenship."

On his return to South Africa, bearing documents showing that the German Government, as well as the Council of the League, had approved the plan of " automatic " naturalization, General Smuts was able to satisfy an influential deputation of the German community in South-West Africa that by accepting citizenship under the terms of the proposed law they would not be committing any act of disloyalty towards their late Fatherland, and received from them an expression of their opinion that the introduction of the " automatic " Union naturalization would generally not meet with serious opposition from the Germans in South-West Africa.

General Smuts' Government, having been defeated in the General Election held in June 1924, went out of office before there had been time for Parliament to pass the necessary Bill, and it fell, therefore, to General Hertzog to carry the measure through the new Parliament during its first session. The Bill as passed applies the Naturalization of Aliens Act of the Union to South-West Africa as if that territory were part of the Union, and then proceeds to enact (section 2) that every adult European who, being a subject of any of the late enemy Powers, was in 1924 domiciled in the territory, shall at the expiry of six months after the commencement of the Act, be deemed to have become a British subject naturalized under the Naturalization Act of the Union, unless within that six months he signs a declaration that he is not desirous of being so naturalized. Section 2 further provides that every person so naturalized

> " shall, except as is otherwise provided by law, be entitled to all the rights, powers and privileges and be subject to all the obligations to which a British subject is entitled or subject within the Union and the territory."

Section 3 provides that no person who signs a declaration excluding himself from such naturalization

> " shall be deemed to have surrendered any right or privilege which, immediately prior to his signing it, he possessed within the territory as an alien in respect of the acquisition or holding of any professional or trading licence, or the carrying on of any trade, business or occupation, nor shall he in any such respect be deemed to have suffered any other prejudice, but his rights, powers, privileges, obligations, duties and liabilities shall remain those of any other alien under the law for the time being."

R. F.

TWO RECENT CANADIAN TREATIES

Two events have recently occurred, of more than usual interest and importance to those concerned with the development of the British self-governing dominions in intra-Empire and international affairs.

One, the final ratification of the Halibut Fisheries treaty with Canada by the United States *without reservation*,[1] marks the close of a rather unusual experiment of the Dominion of Canada in treaty making.

On the events of the four years leading up to the negotiation of this treaty and on the unsatisfactory condition in which it was left in the spring of 1923, I do not intend to dwell, as others have already dealt with it.[2]

It is sufficient for my purpose to state that the treaty, after having been signed by Mr. Ernest Lapointe, the Canadian plenipotentiary, was held up by the insertion of a reservation by the United States Senate as a prerequisite of its consent to ratification. This reservation was not acceptable to Canada, and, in the words of Mr. Malcolm Lewis, " the treaty remained in a state of suspended animation." [3]

The Senate's reservation as proposed by Senator Jones of Washington provided that " none of the nationals and inhabitants and vessels and boats of *any other part of Great Britain* shall engage in halibut fishing contrary to any of the provisions of this treaty." [4] This evidently aimed, despite the defective wording, at bringing all parts of the British Empire within the scope of the treaty, and this result seems to have been reached, but in another way.

The Canadian Government approved of the treaty as originally signed and took the necessary steps to have it ratified. It then enacted legislation [5] to give

[1] *The Times*, October 29, 1924 ; *Mail and Empire* (Toronto), October 22, 1924, and October 24, 1924. The Canadian Government has since registered this treaty with the Secretariat of the League of Nations. *The Times*, February 6, 1924.

[2] A. L. Lowell, " The Treaty making power of Canada," *Foreign Affairs* (*American*), September, 1923, p. 12 ; J. A. R. Marriott, " Empire and Foreign Policy," *Fortnightly Review*, May, 1923, p. 788 ; W. P. M. Kennedy, *Contemporary Review*, June, 1923, p. 737.

[3] *The British Year Book of International Law*, 1923–4, p. 168.

[4] Letter from the Senate Committee on Foreign Relations, April 7, 1924, to N. H. MacKenzie. Executive D. 67th Congress, 4th Session.

[5] The Canadian legislation in question is 13–14 Geo. V (Canada), Chap. 61, and amendments, 14–15 Geo. V (Canada), Chap. 4. See also *Canadian Hansard*, 1924, pp. 566, 672, 673, 674, 933, 934.

effect to the Senate reservation, and informed the Senate of its action. The Senate reconsidered the matter and agreed to the ratification of the treaty without reservations. This has been done, and ratifications were exchanged at Washington.

Opinion differs as to the importance of this Canadian venture, even in Canada, and while the Manitoba Free Press describes it as "a Constitutional Landmark," and goes on to eulogize Mr. King and his government on their achievement,[1] the Conservative *Mail and Empire* of Toronto, in an interesting editorial, disapproves of the whole proceeding and states that "The King Government's ill-timed and empty gesture thus obliged the United States Government to postpone ratification of the convention, and delayed for eighteen months measures which were declared to be urgent in 1923." [2]

As a result of the controversy over this treaty, the Imperial Conference of 1923 appointed a committee to go into the whole question of Imperial treaty making and this committee drafted a very comprehensive resolution dealing with the matter, which was unanimously adopted by the Conference.[3] This resolution outlines the procedure to be followed in the negotiation, signature, and ratification of all treaties made by any of the governments comprising the British Empire and should do much to prevent future misunderstanding and difficulties among them in this regard.

The other event has created less stir but seems perhaps more important in that a commercial treaty was concluded in Ottawa between Canada and Belgium. It was signed on behalf of Canada by the Hon. J. A. Robb and the Hon. Dr. Beland, and for Belgium by the Belgian Consul-General at Ottawa. It is of interest that this, the first treaty concluded within Canada, should be signed in the house bearing the name of Sir Wilfred Laurier, one of the staunch upholders of Canadian autonomy in Canadian affairs.[4]

In view of all this, however, it should not be forgotten that plenipotentiary powers, as issued by the King and ratification by him, are still under the control of the Cabinet at Westminster, and, however improbable, it is still possible for this Cabinet to advise His Majesty to withhold either full powers for negotiation and signature, or his ratification to a completed treaty, and this ensures both knowledge and consent on the part of His Majesty's Government in London.

NORMAN MACKENZIE.

[1] *The Times*, October 29, 1924.
[2] *Mail and Empire* (Toronto), October 24, 1924.
[3] *British Year Book of International Law*, 1924, p. 193. Cmd. 1987, pp. 13, 14, and 15.
[4] *The Times*, July 5, 1924.

DECISIONS, OPINIONS, AND AWARDS OF INTERNATIONAL TRIBUNALS, 1924-5

JUDGMENTS AND ADVISORY OPINIONS OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE [1]

JUDGMENT NO. 2. GIVEN SEPTEMBER 4, 1924. THE MAVROMMATIS PALESTINE CONCESSIONS (QUESTION OF COMPETENCE).

THIS judgment deals with the preliminary question of the Court's competence to hear and determine a claim by the Greek Government against the British Government (as the Government of the Mandatory for Palestine) for compensation for alleged violation by the Administration of Palestine of concessions in that country given by Turkey to M. Mavrommatis, a Greek subject. Three sets of concessions were originally relied on by M. Mavrommatis, but his Government ultimately confined its claim to two which may be called respectively the Jaffa and the Jerusalem concessions. The alleged violation consisted in the grant of concessions (the Rutenberg concessions) inconsistent with the Mavrommatis concessions and refusal to accord to the latter the treatment claimed for them under Protocol XII annexed to the Peace Treaty of Lausanne of July 24, 1923. Proceedings were brought, not under a "compromis" between the two governments, but unilaterally by the Greek Government relying on the provisions discussed below, while the British Government denied that the Court was competent in the absence of consent by both governments to the submission.

The material articles of the Protocol provide :

Article 1 for the maintenance of concessions duly entered into with Turkey before October 29, 1914.

Article 9 for the subrogation to Turkey in territory detached from Turkey of the state acquiring such territory.

Articles 4 to 6 for (*a*) adaptation to the new economic conditions of concessions which had begun to be put into operation on the date of the Protocol, by agreement or, failing agreement within one year from the coming into force of the Treaty of Lausanne, by an award of experts, and for (*b*) exclusion from the right to such adaptation of concessions not having begun to be put into operation on the date of the Protocol, subject to the concessionaire's right to demand dissolution of the concessions within six months from the coming into force of the Treaty of Lausanne and to be thereupon indemnified for prior survey and investigation work to the extent agreed or, failing agreement, settled by an award of experts.

[1] The judgments and advisory opinions of the Permanent Court and acts and documents relating thereto are published by the Court in three separate series containing, respectively, *Judgments* (Series A), *Advisory Opinions* (Series B), and *Acts and Documents relating to Judgments and Advisory Opinions given by the Court* (Series C). The Publisher is A. W. Sijthoff's Publishing Company, Leyden.

The Lausanne Protocol of itself admittedly confers no jurisdiction on the Permanent Court of International Justice. A special jurisdiction as between the Mandatory Power and Members of the League is, however, given to the Court by Article 26 of the mandate for Palestine, which reads as follows :

> " The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations."

In order to establish its competence, which rests on consent of the parties in all cases, the Court required to be satisfied that the question brought before it was a dispute which fell within the terms of this Article and which the British Government had accordingly agreed in advance to permit to be judged by the Court. It was contended by the Greek and denied by the British Government that the question satisfied this condition as being a dispute as to the interpretation and/or the application of Article 11 of the mandate, more particularly of the provision :

> " The Administration of Palestine . . . *subject to any international obligations accepted by the Mandatory*, shall have full power to provide for public ownership or control of any of the natural resources of the country or of the public works, services and utilities established or to be established therein."
>
> " L'Administration de la Palestine . . . *sous réserve des obligations internationales acceptées par le Mandataire*, elle aura pleins pouvoirs pour décider quant à la propriété ou au contrôle public de toutes les ressources naturelles du pays ou de travaux et services d'utilité publique déjà établis ou à y établir."

After deciding that the question at issue was in fact a dispute between the Mandatory and a Member of the League which had made its own a claim by one of its subjects to have been injured by an act of the Mandatory contrary to international law, and that in view of the failure of the negotiations between M. Mavrommatis and the British authorities, Greece was entitled to have the dispute regarded by the Court as one which could not be settled by negotiation, the judgment reaches the conclusion that the Rutenberg concessions constituted an application of the system of " public control," and thus fell within the scope of Article 11 of the mandate. In giving these concessions the Palestine Administration was accordingly bound to respect international obligations accepted by the Mandatory within the meaning of Article 11. This means obligations having relation to the powers granted under the Article, and the obligations of the Lausanne Protocol XII fall within this description. The Jerusalem concessions, dating from before October 29, 1914, had admittedly to be dealt with under the Protocol. Accordingly this part of the Greek case concerned the interpretation of Article 11 of the mandate and fell within the jurisdiction conferred on the Court by Article 26. The Jaffa concessions, on the other hand, not having been converted into concessions duly signed by the Ottoman authorities until January 8, 1916, and falling for that reason outside the scope of the

Protocol, are not the subject of a special obligation accepted by the Mandatory power, but are at most valid against it in virtue of the general principles of international law. This being so, they are not the subject of an international obligation accepted by the Mandatory within the meaning of Article 11 of the mandate, and the Greek case, so far as it relates to them, is outside the competence of the Court.

The latter part of the Court's judgment examines and rejects various arguments against the Court's competence based upon the dates of the different instruments and acts relied on and upon the establishment by the Lausanne Protocol of special machinery for dealing with concessions and claims thereunder. As regards the latter class of objections, the judgment holds that so long as the dispute relates to points which are preliminary to the application of the Protocol, the provisions of the Protocol relating to procedure in various events cannot validly be urged against the Court's jurisdiction.

The Court accordingly retained the part of the Greek claim relating to the Jerusalem concessions for judgment on the merits.

The Court's judgment was given by a majority of seven Judges against five. The majority consisted of Judges Loder, Weiss, Nyholm, Altamira, Anzilotti, Huber, and Caloyanni, national judge (Greek), sitting in virtue of Article 31 of the Court's Statute. Separate dissenting judgments were delivered by Judges Lord Finlay, Moore, de Bustamante, Oda and Pessoa.

Judgment No. 3. Given September 12, 1924. Interpretation of Treaty of Neuilly, Article 179, Annex, Paragraph 4.

This judgment, given by the Court sitting as a Chamber of Summary Procedure (Judges Loder, Weiss and Huber), decides a dispute between Bulgaria and Greece in regard to the jurisdiction of the arbitrator appointed under the above-mentioned paragraph.

The paragraph entitles Greece to charge upon the property, rights and interests of Bulgarian nationals within Greek territory, or upon the net product of their sale, liquidation or other dealings therewith, various categories of indemnities including " paiement des réclamations introduites pour des actes commis par le Gouvernement bulgare ou par toute autorité bulgare postérieurement au 11 octobre 1915 et avant que cette Puissance alliée ou associée ne participât à la guerre." The amount of such claims is to be fixed by an arbitrator. The dispute was as to whether the above words authorize claims in respect of acts committed outside Bulgarian territory, as it was constituted on October 11, 1915, in particular in districts occupied by Bulgaria after her entry into the war, and as to whether they authorize claims for injury to the person as well as for damage to property, rights and interests. It was referred to the Court (Chamber of Summary Procedure) by a " compromis " ratified by the two governments on May 29, 1924. The Court answered both questions in the affirmative, and held further that the reparation due was part of the reparation contemplated by Article 121 of the Treaty and was consequently included in the total capital sum mentioned in Articles 121 and 122. This conclusion resulted from acceptance of the propositions that the category of claims in question stood by itself and was not limited by the criteria applicable to other categories of claims under the rest of the paragraph or other parts of the Treaty

or the Treaty of Versailles, and on the other hand that the paragraph did not impose on Bulgaria obligations additional to those imposed elsewhere in the Treaty but in the material passage referred only to reparation due under the reparation clauses (Part VII) of the Treaty.

JUDGMENT NO. 5. GIVEN MARCH 26, 1925. THE MAVROMMATIS JERUSALEM CONCESSIONS (JUDGMENT ON THE MERITS.).

The claim decided in this judgment had been held by the Court to be within its competence by the judgment of September 4, 1924, of which a summary, showing the general nature of the claim, is given above. The main issues were :

1. Whether the Mavrommatis Jerusalem concessions were valid, in view of the fact that the holder was described in them as an Ottoman subject, although he is and was in fact a Greek subject.

The Court found the British Government to have failed to show that the validity of the concessions was in any way conditional upon M. Mavrommatis being an Ottoman subject, and that the right to benefit by the Lausanne Protocol XII, being dependent on the real nationality of the claimant, was not to be denied him because of the erroneous description of his nationality contained in the concessions.

2. Whether the Rutenberg concessions, having, as the Court had already held, been given in exercise of the power to provide for public ownership, &c., created by Article 11 of the Palestine Mandate, were inconsistent with rights to which the Mavrommatis Jerusalem concessions were entitled under the Lausanne Protocol—which the Court had already decided to be an international obligation subject to which under that article the power was exercisable—and consequently constituted a violation of a duty resting on the British Government under the mandate ; and whether, if so, any damage had resulted for which compensation should be paid.

The Court found that the Rutenberg concessions were inconsistent with the Lausanne Protocol, but only in so far as they gave the holder a right to obtain the abrogation of any valid pre-existing concessions covering the same ground. The Greek Government was held to have failed to show any damage to M. Mavrommatis resulting from the existence of this provision. The Court was further satisfied that M. Rutenberg waived his rights under the provision and that the British authorities undertook not to apply it. Consequently, no damages were awarded to the Greek Government on this issue.

3. Whether the Jerusalem concessions fell within Article 4 of the Lausanne Protocol so as to be entitled to re-adaptation to the new economic conditions, or fell within Article 6 so as merely to be entitled either to be maintained without adaptation or to be dissolved on payment of compensation for prior survey and investigation work.

This issue was decided by the Court by consent of the two governments concerned. The Court recognized that without such consent it would not have been competent to decide which article was applicable. The decision turned upon the question whether the Jerusalem concessions had " begun to be put into operation." In the French text, which is the authoritative text, this phrase reads " reçu un commencement d'application." The Court held that these words did not imply, as contended by the British Government, that the contem-

plated works had begun to be executed, but laid down a condition which was satisfied by doing anything under the terms of the contract. M. Mavrommatis had performed several acts which should be regarded, not as conditions precedent to the existence of the contract, but as acts done under the contract, for example, submitting plans, arranging for credits, &c. Accordingly, the applicable article was Article 4, and the Court so decided. The Court held itself not competent to decide what results would follow from the application of Article 4, these being matters to be dealt with by the machinery provided by the Protocol itself.

Apart from the above issues, the Greek Government asked for compensation on the ground that British military authorities had in 1918 utilized certain of M. Mavrommatis' designs and plans. The Court considered that this claim, which was based on Article 3 of the Lausanne Protocol, not being brought before it by agreement between the two governments and not being a claim for violation of an obligation resting on the British Government under the Palestine mandate, lay outside its jurisdiction.

The present judgment should be consulted, as well as the judgment No. 2, on the question of the Court's competence. In particular, the former judgment did not clearly indicate whether the obligatory jurisdiction of the Court was regarded as extending to the question which article of the Protocol applied to the Jerusalem concessions. The present judgment shows that this was not the case, and that the issue over which jurisdiction was asserted was merely the question whether the Greek Government was entitled to damages for acts done under the power given by Article 11 of the Palestine mandate and violating the obligation, attached to this power by that article, of not interfering with the application of the Lausanne Protocol to concessions entitled to benefit thereby.

Judgment No. 4. Given March 26, 1925. Interpretation of Judgment No. 3.

This is the first case of an application to the Court to interpret one of its judgments under the following provision of Article 60 of its Statute :

> " In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party."

The application was one by the Greek Government for an interpretation, on certain points, of Judgment No. 3 summarized above. As the other party, the Bulgarian Government, concurred in the Court's giving the required interpretation, the Court did not consider whether it could base jurisdiction to interpret a judgment on a unilateral request by one party, without evidence of a dispute between the parties upon the points raised. The Court refused to give the interpretation asked for, since it was of the opinion that the points raised went outside the matters submitted to it in the original case.

Advisory Opinion No. 9. Given September 4, 1924. Question of the Monastery of Saint-Naoum

In this case a small district containing the Monastery of Saint-Naoum had been allotted to Albania by the Conference of Ambassadors in the process of fixing the frontier between Albania and the Serb-Croat-Slovene State. It appears from the Court's judgment that the Conference of Ambassadors should be regarded as acting in the matter as the agent of the Principal Allied Powers

after the two states concerned and also the Assembly of the League of Nations, by a resolution to which these two states were parties, had recognized it to be appropriate that the frontier in question should be settled by the said Powers. By a decision of November 9, 1921, the Conference appointed a Delimitation Commission to determine the frontier, with instructions which, in the opinion of the Serb-Croat-Slovene State, implied that the line was to follow the line laid down by the instrument known as the Protocol of London of 1913 except as was otherwise provided. The Delimitation Commission was unable to find in the Protocol of London any decision as to the attribution of St. Naoum, and on December 6, 1922, the Conference of Ambassadors, being also of opinion that the matter was not settled by the Protocol of London, attributed St. Naoum, on the merits, to Albania. Subsequently the Yugo-Slav Government asked for a revision of this decision. The Conference of Ambassadors invited the Council of the League of Nations to give its opinion as to whether the decision could be revised. The matter having been referred by the Council to the Court, the latter was unanimously of the opinion that the Conference of Ambassadors' decisions were final, and, without discussing in detail what circumstances might possibly justify the revision of such a final decision, the Court advised that the Yugo-Slav Government had not shown any grounds on which the decision of December 6, 1922, could properly be reconsidered by the Conference of Ambassadors. The Court's opinion was transmitted by the Council of the League of Nations to the Conference of Ambassadors.

Advisory Opinion No. 10. Given February 21, 1925. Exchange of Greek and Turkish Populations.

The Convention of Lausanne of January 30, 1923, regarding the exchange of Greek and Turkish populations provides for a general compulsory exchange between Greece and Turkey of Turkish nationals of Greek Orthodox religion established in Turkey, and Greek nationals of Moslem religion established in Greece. A Mixed Commission composed of representatives of the two governments concerned and neutral members appointed by the Council of the League of Nations is created " with full power to take the measures necessitated by the execution of the present Convention and to decide all questions to which this Convention may give rise " (Article 12). The Convention excludes from the compulsory exchange the Greek inhabitants of Constantinople who are defined as " all Greeks who were already *established* before the 30th October, 1918 within the areas under the Prefecture of the City of Constantinople, as defined by the law of 1912 " (Article 2). At the request and for the assistance of the Mixed Commission, the Council of the League of Nations asked the Court what meaning and scope should be attributed to the word " established " as used in the above definition, and what conditions the Greek inhabitants of Constantinople must fulfil in order to be considered as established. The main point in dispute between Greece and Turkey was whether the word " established " denoted a status conferred by Turkish law, the possession of which could only be determined by the Turkish courts and not by the Mixed Commission. Rejecting this interpretation, the Court unanimously held that the Mixed Commission was alone competent to determine whether a Greek inhabitant of Constantinople was " established " within the meaning of Article 2 of the Convention and, as such,

exempt from the compulsory exchange. It advised that in order to be considered as established, a person must reside within the boundaries specified in the article, have arrived there from no matter what quarter before October 30, 1918, and have had prior to that date the intention of residing there in a permanent manner.

H.

ARBITRATION BETWEEN GREAT BRITAIN AND COSTA RICA [1]

THE following extracts from the opinion of Chief Justice W. H. Taft, sole arbitrator, delivered at Washington on October 18, 1923, contain a useful discussion of the circumstances in which a state is bound by the acts of a revolutionary government, which has temporarily replaced the legitimate authorities, and of the weight that should be attributed in those circumstances to the fact that other states have or have not recognized the revolutionary government as the government of the country.

The arbitrator stated the facts and the issues for his decision as follows :

" In January, 1917, the government of Costa Rica, under President Alfredo Gonzalez, was overthrown by Frederico Tinoco, the Secretary of War. Gonzalez fled. Tinoco assumed power, called an election and established a new constitution in June, 1917. His government continued until August 1919, when Tinoco retired, and left the country. His government fell in September following. After a provisional government under one Barquero, the old constitution was restored and elections held under it. The restored government is a signatory to this treaty of arbitration.

" On August 22, 1922, the constitutional congress of the restored Costa Rican government passed a law known as Law of Nullities No. 41. It invalidated all contracts between the executive power and private persons, made with or without approval of the legislative power between January 27, 1917 and September 2, 1919, covering the period of the Tinoco Government. It also nullified the legislative Decree No. 12 of the Tinoco Government, dated June 28, 1919, authorizing the issue of fifteen million colones currency notes. The colon is a Costa Rican gold coin or standard nominally equal to forty-six and one-half cents of an American dollar, but it is uncoined and the exchange value of the paper colon actually in circulation is much less. The Nullities Law also invalidated the Legislative Decree of the Tinoco Government of July 8, 1919, authorizing the circulation of notes of the denomination of 1,000 colones, and annulled all transactions with such colones bills between holders and the state, directly or indirectly, by means of negotiation or contract, if thereby the holders received value as if they were ordinary bills of current issue.

" The claim of Great Britain is that the Royal Bank of Canada and the Central Costa Rica Petroleum Company are British corporations whose shares are owned by British subjects ; that the Banco Internacional of Costa Rica and the Government of Costa Rica are both indebted to the Royal Bank in the sum of 998,000 colones, evidenced by 998 one thousand colones bills held by the Bank ; that the Central Costa Rica Petroleum Company owns, by due assignment, a grant by the Tinoco Government in 1918 of the right to explore for and

[1] The opinion and award are printed in full in the *American Journal of International Law* for January, 1924.

exploit oil deposits in Costa Rica, and that both the indebtedness and the concession have been annulled without right by the Law of Nullities and should be excepted from its operation. She asks an award that she is entitled on behalf of her subjects to have the claim of the Bank paid, and the concession recognized and given effect by the Costa Rican Government.

" The Government of Costa Rica denies its liability for the acts or obligations of the Tinoco Government, and maintains that the Law of Nullities was a legitimate exercise of its legislative governing power. It further denies the validity of such claims on the merits, unaffected by the Law of Nullities.

" It is convenient to consider first the general objections to both claims of Great Britain, urged by Costa Rica, and then if such general objections can not prevail, to consider the merits of each claim and Costa Rica's special defences to it.

" Coming now to the general issues applicable to both claims, Great Britain contends, first, that the Tinoco Government was the only government of Costa Rica *de facto* and *de jure* for two years and nine months ; that during that time there was no other government disputing its sovereignty ; that it was in peaceful administration of the whole country, with the acquiescence of its people.

" Second, that the succeeding government could not by legislative decree avoid responsibility for acts of that Government affecting British subjects, or appropriate or confiscate rights and property created by that Government except in violation of international law ; that the act of Nullities is as to British interest therefore itself a nullity, and is to be disregarded ; with the consequence that the contracts validly made with the Tinoco Government must be performed by the present Costa Rican Government, and that the property which has been invaded or the rights nullified must be restored.

" To these contentions the Costa Rican Government answers :

" First, that the Tinoco Government was not a *de facto* or *de jure* government according to the rules of international law. This raises an issue of fact.

" Second, that the contracts and obligations of the Tinoco Government, set up by Great Britain on behalf of its subjects, are void, and do not create a legal obligation, because the government of Tinoco and its acts were in violation of the constitution of Costa Rica of 1871.

" Third, that Great Britain is estopped by the fact that it did not recognize the Tinoco Government during its incumbency, to claim on behalf of its subjects that Tinoco's was a government which could confer rights binding on its successor.

. . . . . .

" Dr. John Bassett Moore, now a member of the Permanent Court of International Justice, in his *Digest of International Law*, Volume i, p. 249, announces the general principle which has had such universal acquiescence as to become well settled International Law :

> ' Changes in the government or the internal policy of a state do not as a rule affect its position in international law. A monarchy may be transformed into a republic or a republic into a monarchy ; absolute principles may be substituted for constitutional, or the reverse ; but, though the government changes, the nation remains with rights and obligations unimpaired. . . .

'The principle of the continuity of states has important results. The state is bound by engagements entered into by governments that have ceased to exist; the restored government is generally liable for the acts of the usurper. The governments of Louis XVIII and Louis-Philippe so far as practicable indemnified the citizens of foreign states for losses caused by the government of Napoleon; and the King of the two Sicilies made compensation to citizens of the United States for the wrongful acts of Murat.'

" Again Dr. Moore says:

'The origin and organization of government are questions generally of international discussion and decision. Foreign powers deal with the existing *de facto* government, when sufficiently established to give reasonable assurance of its permanence, and of the acquiescence of those who constitute the state in its ability to maintain itself, and discharge its internal duties and its external obligations.'

" The same principle is announced in Prof. Borchard's new work on *The Diplomatic Protection of Citizens Abroad*:

'Considering the characteristics and attributes of the *de facto* government, a general government *de facto* having completely taken the place of the regularly constituted authorities in the state binds the Nation, so far as its international obligations are concerned; it represents the state; it succeeds to the debts of the regular government it has displaced and transmits its own obligation to succeeding titular governments. Its loans and contracts bind the state and the state is responsible for the governmental acts of the *de facto* authorities. In general its treaties are valid obligations of the state. It may alienate the National territory and the judgments of its courts are admitted to be effective after its authority has ceased. An exception to these rules has occasionally been noted in the practice of some of the states of Latin America, which declare null and void the acts of a usurping *de facto* intermediary government, when the regular government it has displaced succeeds in restoring its control. Nevertheless, acts validly undertaken in the name of the state and having an international character can not lightly be repudiated and foreign governments generally insist on their binding force. The legality or constitutional legitimacy of a *de facto* government is without importance internationally so far as the matter of representing the state is concerned. (Bluntschli, Sects. 44, 45, 120; Holtzendorff, II, Sect. 21; Pradier-Fodéré, Sect. 134, 139; Rivier, II, 131, 440; Rougier, 481, *France* v. *Chile*; Franco-Chilean Arbitration Lausanne, p. 220.)'

" The same views are expressed by Chancellor Kent (1 Comm. 14th ed., p. 25), by Mr. Wheaton (Wheaton's *International Law*, Philippson's 5th Eng. ed., p. 37), by Mr. Hall (*International Law*, 6th ed., J. B. Atlay, 1909, pp. 20, 21), and by Dr. Woolsey in his *Introduction to the Study of International Law* (ed. 1873, pp. 32, 52, 53, 171, 172)."

The Arbitrator then examined the facts to be gathered from the documents and evidence submitted by the two parties as to the *de facto* character of the

Tinoco Government, and concluded that as Tinoco was in " actual and peaceable control without resistance or conflict or contest by any one until a few months before the time when he retired and resigned," his Government must be regarded as an " actual sovereign government." It was, however, urged before the Arbitrator that many leading Powers had refused to recognize the Tinoco Government, and that recognition by other nations is the chief and best evidence of the birth, existence and continuity of succession of a government. As to this the facts were that by the end of 1917 that Government had been recognized by Bolivia, Argentina, Chile, Haiti, Guatemala, Switzerland, Germany, Denmark, Spain, Mexico, Holland, The Vatican, Colombia, Austria, Portugal, El Salvador, Rumania, Brazil, Peru, and Ecuador. The United States, and her then allies in the war, Great Britain, France, and Italy, declined to recognize the Tinoco Government throughout its existence.

The Arbitrator stated his conclusion on this argument as follows :

" The non-recognition by other nations of a government claiming to be a national personality, is usually appropriate evidence that it has not attained the independence and control entitling it by international law to be classed as such. But when recognition *vel non* of a government is by such nations determined by inquiry, not into its *de facto* sovereignty and complete governmental control, but into its illegitimacy or irregularity of origin, their non-recognition loses something of evidential weight on the issue with which those applying the rules of international law are alone concerned. What is true of the non-recognition of the United States in its bearing upon the existence of a *de facto* government under Tinoco for thirty months is probably in a measure true of the non-recognition by her Allies in the European War. Such non-recognition for any reason, however, can not outweigh the evidence disclosed by this record before me as to the *de facto* character of Tinoco's government, according to the standards set by International Law."

This is an important expression of opinion that the recognition or non-recognition of a government by other states is a fact which has merely probative weight, when the issue is the existence or non-existence of that government in the society of nations.

The Arbitrator dealt with the second contention of Costa Rica set out above, as follows :

" To hold that a government which establishes itself and maintains a peaceful administration, with the acquiescence of the people, for a substantial period of time, does not become a *de facto* government unless it conforms to a previous constitution would be to hold that within the rules of international law a revolution contrary to the fundamental law of the existing government can not establish a new government. This can not be, and is not, true. The change by revolution upsets the rule of the authorities in power under the then existing fundamental law, and sets aside the fundamental law in so far as the change of rule makes it necessary. To speak of a revolution creating a *de facto* government, which conforms to the limitations of the old constitution, is to use a contradiction in terms. The same government continues internationally, but not the internal law of its being. The issue is not whether the new government assumes power or conducts its administration under constitutional limitations established

by the people during the incumbency of the government it has overthrown. The question is, has it really established itself in such a way that all within its influence recognize its control, and that there is no opposing force assuming to be a government in its place? Is it discharging its functions as a government usually does, respected within its own jurisdiction?"

On the third contention of Costa Rica he said:

"It is further objected by Costa Rica that Great Britain by her failure to recognize the Tinoco Government is estopped now to urge claims of her subjects dependent upon the acts and contracts of the Tinoco Government. The evidential weight of such non-recognition against the claim of its *de facto* character I have already considered and admitted. The contention here goes further and precludes a government which did not recognize a *de facto* government from appearing in an international tribunal in behalf of its nationals to claim any rights based on the acts of such government.

. . . . . .

"I do not understand the arguments on which an equitable estoppel in such case can rest. The failure to recognize the *de facto* government did not lead the succeeding governments to change its position in any way upon the faith of it. Non-recognition may have aided the succeeding government to come into power; but subsequent presentation of claims based on the *de facto* existence of the previous government and its dealings does not work an injury to the succeeding government in the nature of a fraud or breach of faith. An equitable estoppel to prove the truth must rest on previous conduct of the person to be estopped, which has led the person claiming the estoppel into a position in which the truth will injure him. There is no such case here.

"There are other estoppels recognized in municipal law than those which rest on equitable considerations. They are based on public policy. It may be urged that it would be in the interest of the stability of governments and the orderly adjustment of international relations, and so a proper rule of International Law, that a government in recognizing or refusing to recognize a government claiming admission to the society of nations should thereafter be held to an attitude consistent with its deliberate conclusion on this issue. Arguments for and against such a rule occur to me; but it suffices to say that I have not been cited to text writers of authority or to decisions of significance indicating a general acquiescence of nations in such a rule. Without this, it can not be applied here as a principle of International Law.

"It is urged that the subjects of Great Britain knew of the policy of their home government in refusing to recognize the Tinoco régime and can not now rely on protection by Great Britain. This is a question solely between the home government and its subjects. That government may take the course which the United States has done and refuse to use any diplomatic offices to promote such claims and thus to leave its nationals to depend upon the sense of justice of the existing Costa Rican government, as they were warned in advance would be its policy, or it may change its conclusion as to the *de facto* existence of the Tinoco government and offer its subjects the protection of its diplomatic intervention. It is entirely a question between the claimants and their own government. It should be noted that Great Britain issued no such warning to its subjects as did the United States to its citizens in this matter."

On the merits of the British claims the Arbitrator's decision was on the whole favourable to Costa Rica, but this part of his opinion is of less general interest.

J. L. B.

DECISIONS OF THE GERMAN-AMERICAN MIXED CLAIMS COMMISSION (*continued—see British Year Book of International Law*, 1924, p. 222)

In the Year Book for 1924 (pp. 222 ff.) I reviewed the more important decisions which had been rendered prior to the writing of my note. In various awards since made, the Commission (or Umpire) has applied in particular cases the principles laid down in the preliminary "administrative decisions" which enunciated the rules by which they would be guided in deciding the claims submitted to them. Several important decisions have likewise been rendered which involved other principles than those laid down in the "administrative decisions".

It will be recalled that in the *Lusitania* cases the Commission decided that Germany was bound to make full compensation for all lives lost on the *Lusitania*, and that it adopted certain rules for determining the amount which in each case would be regarded as proper compensation for the loss sustained by the claimant. Some 190 claims have been filed; of these, 150 have now been disposed of, and awards aggregating $1,917,576 have been made on account of personal injuries sustained by survivors or on account of losses resulting from death or on account of loss of personal property. The majority of the awards were made by the Umpire alone upon a certificate of disagreement on the part of the Commissioners. The maximum amount awarded in the case of a single life was $130,000 which was allowed to the widow and seven-year-old daughter of Albert Hopkins. At the time of his death Hopkins was 44 years of age; he held a responsible position with a shipbuilding firm; was a highly-trained expert in the shipbuilding industry; in a period of ten years his salary had been raised from $4,000 to $25,000 per year; he was in excellent health; his habits were good; his life expectancy was 25½ years; his official and social position was such as to require the spending of his entire salary, which was his only source of income; and he left only a life insurance policy of $10,000, which constituted the sole means for the support of his widow and child. Taking these circumstances into consideration, the Umpire awarded the widow $50,000 and the child $80,000.

In the case of Albert Bilicke, who was drowned on the *Lusitania*, the sum of $140,000 was awarded to his widow and three minor children, but a portion of this amount was awarded to the widow for personal injuries which she sustained and which left her largely a mental and physical wreck. Bilicke was a wealthy real estate dealer, 54 years of age; at the time of his death he was active in the management of his business, and the estimated annual cost of maintaining his domestic establishment ranged between $35,000 and $68,000. Included in the loss sustained by the children, and which was taken into consideration by the Umpire in fixing the amount of the award, was the "deprivation of the care and supervision of a father of unusually strong character and sound judgment."

In the case of Charles Frohman, a well-known theatrical producer, who was drowned on the *Lusitania*, and whose net annual income was estimated at more than $350,000, the Umpire refused to award anything to his brothers and sisters because they were not " surviving dependants," and there was no evidence that, but for Germany's act which resulted in his death, any of them would probably have received from him any greater contributions than they have received from his estate as his heirs. In other cases awards were denied brothers, sisters, and other relatives when it was not shown that they had sustained a pecuniary loss or a loss which could be measured by pecuniary standards. On account of the high social, financial, or professional standing of many of the victims of the sinking of the *Lusitania*, claimants endeavoured in some cases to induce the Umpire to take into consideration, in fixing the amount of the award, the " value of the life " lost, but this he declined to do, and in each case determined, so far as it could be measured by pecuniary standards, only the loss sustained by the claimant on account of the death, and a sum to cover this loss alone was awarded.

In the case of the *Life Insurance Claims* (decided September 18, 1924) the Commission was called upon to determine whether various life insurance companies were entitled to recover from Germany alleged losses resulting from their being compelled to make payments upon policies issued by them upon the lives of certain passengers who were drowned by the torpedoing of the *Lusitania*. The American agent contended that if an insurance company is compelled to pay under a policy where death results from a war risk which was not in contemplation and for which no premium to cover such risk had been specifically exacted, the company sustained a loss equal to the difference between the face of the policy and the reserve created by setting aside a portion of the premium for retiring the policy. Insurance contracts, he maintained, were based on mortality tables, that in fixing the amount of the premiums on the present policies, the risks of war had not been taken into consideration, that the sinking of the *Lusitania* having been done in violation of the rules of international law, it could not have been in the contemplation of the parties when the policies were issued ; that the torpedoing of the ship forced the companies to pay prematurely the face value of the policies ; that not having exacted any premium out of which to make such premature payments they had, as stated above, sustained losses amounting to the difference between such payments and the reserves. The agent for the German Government contended, on the other hand, that the risks of war, to non-combatants as well as to those in the military service, were known to insurance actuaries and must have been taken into account by them in fixing the rates of premium, as was shown by the fact that the policies issued on the lives of Mr. Vanderbilt and Mr. Hopkins specifically excluded insurance covering deaths resulting from war.

The American and German Commissioners having been unable to reach an agreement on this point, the decision of the question devolved upon the Umpire, Judge Parker, who in a learned opinion rejected the contention of the American agent. It was apparent, he said, that in issuing a life insurance policy without expressly excluding any risk and without any restrictions whatsoever, self-protection and sound business policy must have impelled the insurance company to take into account every possible risk, without limiting itself to those forming the basis of a mortality table used by it and which was compiled more than half

a century before the *Lusitania* was sunk. The American agent, he said, was wrong in assuming that a mortality table determines absolutely the amount of the premium exacted; it might be the only yard-stick used by agents in soliciting insurance, but actuaries in prescribing a schedule or formula to be applied by such agents must of necessity take into account " changes wrought in the structures and conditions of civilization since the table was compiled, including the lengthening of human life through improved hygienic conditions," &c. Deaths from earthquakes, fires, epidemics, tidal waves, and other disasters must be within the contemplation of insurers and must be paid for, and they may result in group losses to insurers, from deaths far exceeding the expected death-rate of such groups. In practice unusual and unexpected death payments are as likely to result from contemplated as from uncontemplated causes of death. In other words, there exists no relation of cause and effect between the contemplation on the part of the insurer of the risk which subsequently causes the death of the insured and the loss which the insurer sustains.

Nevertheless, while rejecting the contention of the American agent that the insurance companies necessarily sustained losses where they were compelled to pay for the deaths of the insured, resulting from a war risk not contemplated and for which no premiums had been specifically exacted to cover such risk, Judge Parker held that the acceleration in the time of payments which the companies had contracted to make, resulted in losses to them, in the sense that it reduced their profits, actual or prospective. In so holding, he rejected the contention of the German agent. Was Germany bound by the treaty of peace to pay losses of this class? Judge Parker held that she was not, because her obligation, by the express terms of the treaty, was limited to the payment of damages suffered by the " surviving dependants " of American civilians whose deaths were caused by acts of war. By a common rule of construction this excluded liability for damages suffered by other classes, such as life insurers. The latter were not entitled by subrogation or otherwise " to stand in the shoes of the representatives of the estate of the insured or of the beneficiary of the policy and pursue their rights, if any exist, against the author of the death of the insured." Germany could not be held liable for losses resulting from the acceleration of maturity, because there was, in legal contemplation, no causal connexion between her act and the obligations arising under the insurance contracts, of which she had no notice and with which she was not even remotely connected. Otherwise stated, the accelerated maturity of the insurance policies was not a natural and normal consequence of Germany's act in taking the lives of the insured, and hence not attributable to that act as a proximate cause.

Judge Parker also pointed out that it was obvious that " precisely to the extent that American insurers have sustained losses by reason of being prematurely deprived of the use of funds paid by them to American beneficiaries, such American beneficiaries have been correspondingly benefited through the acceleration in the time of payment to them." " The losses here claimed," he said, " are not economic losses to the American nation but only losses sustained by one group of American nationals to the corresponding benefit of another group of American nationals, growing out of their intercontractual relations, rather than out of any economic injury inflicted by Germany's act. To hold, as this Commission did in the *Lusitania* cases, that in arriving at the net losses suffered by American surviving dependants of *Lusitania* victims no part of the

payments received by such survivors as beneficiaries under insurance contracts should be deducted from the present value of contributions which such victims, had they lived, would probably have made to such survivors, and at the same time to hold Germany bound to pay the insurers for all losses sustained by them due to the acceleration of the time of payment, would obviously result in Germany being held liable to the United States for losses which neither the United States as a nation nor its nationals as a whole had suffered but which one group of its nationals had lost to another group of its nationals." He added, finally, that there was no reported case, international or municipal, in which a claim of a life insurance company had been sustained against an individual, a private corporation, or a nation causing death resulting in loss to such insurance company. He cited various cases in which such claims had been made, but they had, he said, been uniformly denied. The American Courts, in particular, including the United States Supreme Court, had rejected such claims, and they could not now be asserted on behalf of American insurers against Germany.

In an important decision rendered on October 31, 1924, Umpire Parker laid down the rules and principles which should be applied in determining the jurisdiction of the Commission in groups of cases in which the claimant (1) did not acquire American nationality until after the date of the loss or injury for which damages were claimed, (2) lost American nationality subsequent to the date of such loss or injury, and (3) in which the claim had been transferred by American citizens to foreign nationals, through assignment, succession, or otherwise. The two Commissioners being unable to agree on all the points raised they certified the fact of disagreement to the Umpire who rendered the decision. The German agent had maintained that it was an established rule of international law that no government would assert a claim of a private nature against another government unless the claimant possessed the nationality of the Government asserting it, continuously from its origin to the time of its presentation and even of its final disposal by the tribunal to which it is submitted. Judge Parker observed that this contention struck " deeper than a mere question of jurisdiction." It involved the question whether property rights which have become vested under the treaty of peace with Germany should be preserved or destroyed through a change in the nationality of the original owners. The rule contended for by the German agent was but another way of saying that a change in the nationality of a right, through its voluntary or involuntary transfer, deprives it of the remedy of enforcement through diplomatic intervention. The practical effect of such a rule would frequently be to deprive the owner of his property ; consequently it was doubtful whether it has, or should have, a place among the established rules of international law. Judge Parker admitted that statements could be found in some decisions of international tribunals and in some treatises in support of the rule contended for by the German agent, but it was questionable, he said, whether it had received such universal recognition as to justify the broad statement that it was an established rule of international law. He quoted various decisions of arbitral tribunals which had declined to follow the rule and others which, while following it, had challenged its soundness. Those which had adopted it, he said, had recognized in it a mere rule of practice, and usually there had been vigorous dissenting opinions. It was also clear, he said, that the majority of decisions in these cases were controlled by the language of the particular agreement for arbitration, which

language limited the jurisdiction of the tribunal to claims possessing the nationality of the state asserting them, not only in origin but *continuously*, sometimes until the date of the adjudication. In all such cases it was merely a question of jurisdiction and not a question of the preservation of vested rights.

While admitting that the Commission had jurisdiction over all claims within the terms of the treaty of peace, the German agent, he continued, " would so apply the rule as to take out of the treaty and destroy substantive rights called into being by it. He (the German agent) contends that the transfer of American rights to alien ownership, by whatever means, subsequent to the treaty becoming effective destroys those rights." The Umpire said he had no hesitation in holding that there was no warrant for reading into the treaty such a rule of practice. It was sufficient that the claims possessed the status of American nationality, both in origin and at the time the treaty became effective. A subsequent change in their nationality, through succession, assignment, or otherwise, could not operate to extinguish them. The rule invoked, if applied, would make the continued existence of a right which had vested under the treaty dependent upon such uncertain factors as the life, death, or marriage, or the business success or failure of the private owner of the claim. The United States might in its discretion decline to press such a claim, but that was a question of political policy rather than the exercise of a legal right. Once the United States having espoused and asserted a private claim it became a government-owned claim, and it was not within the right of Germany to challenge the right thus asserted. He therefore decided that all claims which were impressed with American nationality both on the date when the loss, damage, or injury occurred, and on the date when the treaty of peace became effective (November 11, 1921), were within the jurisdiction of the Commission, and that the transfer, assignment, or devolution by succession of such claims from American nationals to aliens, subsequent to the coming into effect of the treaty, had no effect upon Germany's obligation to pay them or the right of the United States to demand their payment. Finally, the term " American national " meant any person wherever domiciled who owed allegiance to the United States, and it embraced not only citizens but Indians and members of other aboriginal tribes or native peoples of the United States and of its territories and possessions.

In an opinion rendered on March 25, 1924, Umpire Parker construed the meaning of the words " naval and military works or materials " used in the Treaty of Versailles (Par. 9 of Annex I to Sec. I of Part VIII), which was carried by reference into the treaty of peace between Germany and the United States.[1] This provision obligates Germany to make compensation for damages in respect to all property, wherever situated, belonging to any of the allied or associated powers or their nationals, with the exception of " naval and military works or materials " which has been carried off, seized, injured, or destroyed by the acts of Germany or her allies on land, on sea or from the air, &c. In these cases certain claims had been put forward by the United States, in some instances on its own behalf and in others on behalf of its nationals, for compensation on account of the destruction of ships by Germany or her allies during the period of American belligerency. Some of the ships were owned by the United States

[1] The text of this decision may be found in the *American Journal of International Law* for July, 1924, pp. 614 ff.

Shipping Board. Of these, some were being operated by the Board, some were chartered by it to private operators, and some were under requisition and control of the Board. Others still were owned and operated by private parties for private profit, but were armed for defensive purposes, were manned by naval gun crews, and were routed in accordance with instructions given by the Navy Department. The German agent contended that control by the Shipping Board of vessels whether owned or held by it under requisition created a presumption that the vessels were being used for military purposes, and in the absence of proof to the contrary (the burden being on the United States) they must be classed as " naval and military works or materials " for the destruction of which Germany was not liable to make compensation. The Commission had no hesitation in rejecting this contention. Nothing, it said, short of the operation by the United States of such vessels directly in furtherance of military operations against Germany could be held to create such a presumption.

In some of the cases, privately owned vessels had sought the protection of a belligerent convoy and had voluntarily subjected themselves to naval instructions as to routing and operation for the purpose of avoiding destruction by German submarines. In these cases the German agent contended, in effect, that the association of the ship with a belligerent convoy had the effect of transforming it from a merchantman into a war vessel, and hence Germany was not bound to make compensation for its destruction. This contention was likewise rejected by the Commission.

In two cases the ships, for the destruction of which compensation was claimed, had been requisitioned from their Dutch owners by the United States and were being operated by private companies acting as agents of the Shipping Board. They were unarmed, were employed as merchant vessels, and were in no sense impressed with a military character. But the German agent contended that since they did not " belong " to the United States or any of its nationals they did not fall within the terms of the treaty of peace. This contention was also rejected on the ground that the American possession and use of the vessels were superior to any possible contingent rights of Dutch ownership. That the United States had at least " a special or qualified property " in the ships, it was said, could not be doubted, and this was tantamount to absolute ownership for the time being. Possession by the United States was analogous to that of a grantee having an estate defeasible upon the happening of some event completely within his control. Reference was made to certain decisions of the English courts where it was held that a ship requisitioned and operated by the government under requisition charter " belonged " to His Majesty within the terms of the Merchant Shipping (Salvage) Act of 1916, and hence was entitled to salvage.[1]

In conclusion, the Commission deduced the following general rules with respect to the tests to be applied in determining whether the ships for the destruction of which compensation was claimed fell within the excepted class of " naval and military works or materials " :

1. The ship must have been operated by the United States at the time of

[1] The cases cited were : *Admiralty Commissioners* v. *Page and Others* (1918) 2 K.B. 447, affirmed in (1919) 1 K.B. 299 ; also the *Sarpen*, Court of Appeal (1916) Probate Division, 306, 313.

destruction, for purposes directly in furtherance of a military operation against Germany or her allies.

2. It was immaterial whether the ship was or was not owned by the United States ; her possession, either actual or constructive, and her use by the United States in direct furtherance of a military operation against its then enemies constituted the controlling test.
3. A ship privately operated for private profit could not be impressed with a military character.
4. The fact that a ship was either owned or requisitioned by the Shipping Board or Fleet Corporation and operated by one of them, either directly or through an agent, did not create even a rebuttable presumption that she was impressed with a military character.
5. When, however, a ship, either owned by or requisitioned by the United States during the period of belligerency, passed into the possession and under the operation of the War or Navy Department and thereby became a public ship, there was a presumption that it was intended to be used in furtherance of a military operation.
6. Neither the arming for defensive purposes of a merchantman, nor the manning of such armament by a naval gun crew, nor her routing by the Navy Department for the purpose of avoiding the enemy, nor the seeking by such a vessel of a convoy, or all these combined was sufficient to impress such merchantman with a military character.

A brief summary of the work of the Commission may be of some interest. The total number of claims listed was 12,416,[1] and the total amount for which they were listed was $1,479,064,313. Of these, 7,420 have been disposed of in one way or another, a large number (more than 3,500) having been dismissed.[2] Up to January 1 of the present year awards had been made in 792½ of the docketed cases, the aggregate amount of the awards totalling about $89,000,000. The amount claimed in these cases was $150,522,273.

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[1] The number actually docketed was 4,666.

[2] Of the number actually docketed, 4,334 have been disposed of, leaving only 156 now pending (January 29, 1925).

DECISIONS OF NATIONAL TRIBUNALS INVOLVING POINTS OF INTERNATIONAL LAW

SUPREME COURT OF SOUTH AFRICA

Appellate Division

Jacobus Christian v. *Rex.*

496. November 30, 1923. Full Bench.

Criminal law—High treason—Inhabitant of mandated territory of South-West Africa—Majestas of Mandatory—Treaty of Versailles—League of Nations.

This very interesting case was briefly summarized in the *British Year Book of International Law* for 1924 (p. 227).

The judgments of Chief Justice Innes and Mr. Justice Kotzé, have since been received, and certain portions of them are here reprinted.

The real question at issue was the sovereignty, " majestas " of the Mandatory. How could an inhabitant of South-West Africa, formerly a German Colony—and now governed under a mandate of the League of Nations, be guilty of treason, or, granted that he could commit treason, against whom was it committed? These questions, because of the unusual international situation out of which they arise, are very difficult to answer. The mandated territory, the Mandatory, the League of Nations, the Principal Allied and Associated Powers and Germany all seem to be involved in the matter, and it is further complicated because the Mandatory (the Union of South Africa) is a part of the British Empire, and the international status and degree of sovereignty possessed by it (South Africa) is itself a debatable point.

The Court, however, though it examined these relationships, did not undertake to define or classify them, but contented itself with deciding that under the terms of the mandate the Mandatory was endowed with sufficient powers to constitute internal majestas for the purpose of supporting a charge of treason against the appellant.

The following extracts from the judgment of Chief Justice Innes contain the facts of the case and the line of reasoning adopted in arriving at his decision :

" The appellant, an inhabitant of the mandated territory of South-West Africa, was convicted by the local Circuit Court of High Treason on two counts. Two out of eleven charges were found to have been substantiated : they were to the effect that in May and June 1922 he had engaged in active hostilities against the forces of the mandatory power. The indictment was excepted to *in limine*, but the exception was overruled. Thereafter the following question of law was reserved for the decision of this Court : ' whether the charge as laid discloses the crime of High Treason ? ' To appreciate the point it is necessary to refer to the indictment, which recited that the accused as an inhabitant of the mandated territory ' owed allegiance to His Majesty King George the Fifth in his Government of the Union of South Africa as the Mandatory thereof under

the mandate conferred in pursuance of the Treaty of Peace with Germany, signed at Versailles on the 28th day of June 1919, upon His Britannic Majesty for and on behalf of the aforesaid Government of the Union of South Africa.' It then alleged that the accused during the existence of a rebellion and state of war in the mandated territory, had ' with hostile intent against His Majesty and his said Government ' engaged in active hostilities against his forces; particulars being set out in the relative counts. With the facts of the case we have nothing to do. We are concerned merely with the question of law. The reservation is in the widest terms. But the point which it is meant to raise relates to the international *status* of the Mandatory.

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" This Court has had occasion recently to examine the legal characteristics of high treason. It was laid down in *Rex* v. *Erasmus* (A. D. 1923, p. 73) that the hall mark of the crime was the existence of a hostile intention against the state or the Sovereign. But it was also pointed out that *perduellio* was a branch of the *crimen majestatis* which covered any offence against or encroachment upon the dignity, authority or power of the state. And it is this element which is relied upon; for there can be no *crimen majestatis*, it is urged, where the authority concerned has no *majestas*. The principle no doubt is recognized in the books that *perduellio* can only be committed against a ruler or a state which possesses *majestas*. It is not necessary to refer to all the authorities quoted during argument on this point. Speaking generally, they are to the same effect. But the real difficulty lies in the application of the principle; in deciding whether a particular state or a particular government does or does not possess *majestas*." . . . " But in entering upon the enquiry it is well to bear in mind that *majestas* is exercised in two directions and has a dual aspect, internally it relates to the power of making and enforcing laws, externally to freedom from outside control. A state defends itself against foreign aggression by war; it protects itself against domestic attack, among other ways, by enforcing the criminal penalties for treason. This is pointed out by *Van Alphen* in his introduction to *Bort* (sec. 9). He enumerates six prerogatives as essential to the possession of *majestas*—two of which he says relate to the protection of the state from external violence, two to the conservation of internal peace, and two to both. These prerogatives cover the whole area of autocratic government. I do not propose to detail them; because the importance of the passage for present purposes consists in the recognition which it involves of the two aspects of sovereignty. This distinction between internal and external sovereignty is inherent. And of the two, the internal is the more important; for a law making and law enforcing authority is essential to the very existence of a state. Moreover, in considering the question of treason it is the internal aspect of sovereignty which must be regarded; for that is the side from which it is attacked. This is recognized by *Voet* in the passage already quoted where he states that treason can be committed only against a state or ruler which recognizes no superior in its own territory (*superiorem in suo territorio haud agnoscentem*). The test thus applied relates to internal sovereignty alone; and it is comparatively easy of application, whereas the limits of external sovereignty are often hard to determine. The line which demarcates the necessary degree of freedom from external control must from the nature of things be difficult to draw. And so it has always been found. Curtailment of external authority and dependence upon another power are not

in themselves fatal to the sovereignty of the state concerned. It is in each instance a question of degree. The civil law regarded as free peoples nations who had undertaken by treaty to recognize the *majestas* of Rome; for a recognition of superiority was not regarded as incompatible with freedom.

. . . . . .

" The legal position of South-West Africa, and its Government, under the Treaty of Versailles must now be briefly examined. By Article 119, Germany renounced in favour of the Principal Allied and Associated Powers—that is in favour of the United States, the British Empire, France, Italy and Japan—all rights and titles over her overseas possessions. The expression ' renounce in favour of ' is sometimes used in the treaty as equivalent to ' cede to '. By Articles 83 and 87, for instance, Germany renounced in favour of Czecho-Slovakia and of Poland respectively all right and title over territory within certain boundaries separately specified. That was in effect a cession in each case of the territory indicated; it ceased to form portion of Germany, and it became portion of the new state. Not so with the overseas possessions; or at any rate with such of them as fell within the operation of Article 22. They were not by Article 119 ceded to all or any of the Principal Powers, any more than the City of Danzig was ceded to them under Article 100. The *animus* essential to a legal cession was not present on either side. For the signatories must have intended that such possessions should be dealt with as provided by Part I of the Treaty; they were placed at the disposal of the Principal Powers merely that the latter might take all necessary steps for their administration on a mandatory basis.

. . . . . .

" The mandate for South-West Africa, issued by the Council of the League by virtue of the above Article 22, recites that the Principal Allied and Associated Powers have agreed that a mandate shall be conferred on His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa to administer the territory, and that His Majesty on behalf of the said Government has agreed to accept the mandate and to exercise it on behalf of the League of Nations in accordance with its provisions. Then follow the terms. The Mandatory is to have full power of administration and legislation over the territory, as an integral portion of the Union of South Africa, and may apply the laws of the Union subject to local modifications. It is to promote the material and moral well-being and the social progress of the inhabitants, and to observe the prohibitions and safeguards referred to in Article 22 relating to the slave-trade, the traffic in arms and liquor, the military training of natives, and the establishment of military and naval bases or fortifications. Freedom of conscience and of religious worship is to be ensured, and missionaries, nationals of states Members of the League, are to have rights of entry and residence ' for the purpose of prosecuting their calling.' The annual report under Article 22 is required by the mandate to be to the satisfaction of the Council and to indicate the measures taken to carry out the obligations assumed by the Mandatory. Finally, the consent of the Council is required for any modification of the terms of the mandate; and any dispute between the Mandatory and another Member of the League relating to the interpretation or application of the mandate, failing settlement by negotiation, is to be submitted to the Permanent Court of International Justice.

" It remains to decide whether the Mandatory of South-West Africa, clothed with the powers and subject to the restrictions above indicated, is, in accordance with the principles of our law, possessed of *majestas* so that an attack upon it, with hostile intent, involves the crime of high treason.

" The obligations resulting from the acceptance of the mandate, and the limitations interwoven with the constitution of the mandated territory, are no doubt serious ; the point is whether they are inconsistent with the existence of *majestas* as an attribute of the Mandatory Authority. It will be convenient to regard the position first from the internal and then from the external point of view. The full power of administration and legislation is vested in the Mandatory. That goes very far, for plenary authority to make laws and to enforce them covers the whole sphere of government. Nor are the restrictions upon internal policy in themselves inconsistent with sovereignty. They are stipulations which might quite well be inserted in a treaty between sovereign states controlling undeveloped territories ; and it is common knowledge that similar stipulations have before now found a place in African Conventions. And they are agreed to by the Mandatory in accordance with a treaty to which it is itself a party. They are not restrictions imposed upon a subject state ; they are treaty obligations voluntarily undertaken, and they retain their character though incorporated in the constitution of the new territory. It is more difficult to estimate the effect of the conditions which govern the external relations of the Mandatory. The restrictions in that direction though very real, are implied rather than expressed. Article 22 described the administration of the territories and peoples with which it deals as a tutelage to be exercised by the governing Power as Mandatory on behalf of the League. Those terms were probably employed, not in their strict legal sense, but as indicating the policy which the governing authority should pursue. The relationship between the League and the Mandatory could not with any legal accuracy be described as that of principal and agent. But whatever it may be called, it obliges the Mandatory to lay before the Council an annual report in reference to the territory ; and the provision made for a permanent commission to advise the Council ' on all matters relating to the observance of the mandate ' indicates an intention to confer some degree of supervisory authority upon the Council. But it is not expressly given, nor is its nature and extent defined. The position in which the Principal Powers, the League and the Mandatory stand to one another is most vaguely stated. The main features are these : There was no cession of the German possessions to the Principal Powers : there was merely a renunciation in their favour in order that such possessions might be dealt with in accordance with the terms of the Covenant. And the Principal Powers became bound, as signatories to the treaty to do everything necessary on their part to give effect to the arrangement. This they did by selecting a Mandatory as contemplated by Article 118, and thereby conferring a mandate upon him. The matter then passed under the cognizance of the League and it became the duty of the Council to settle the terms of the mandate in conformity with the provisions of the Covenant. The mandate having been accepted, the Mandatory became obliged to report annually to the Council. No limit was placed on the duration of the mandate and no sanction was provided for a breach of its terms. It was probably considered that the force of public opinion, and in case of dispute the authority of the Court of International Justice would ensure the due observance of the

mandate. It is not necessary to enquire whether the mandate once given could be cancelled, either by the Council which did not appoint the Mandatory, or by the Principal Powers which, having made the appointment, passed the matter on to the Council. Because the *status* of the Mandatory during the existence of the mandate can be sufficiently determined for the purpose of this case by reference to the Treaty and the document itself. And assuming that the terms of the mandate do not exceed the limits of the Covenant, I have come to a definite conclusion upon the contentions of the appellant. It cannot be said that the Government of South-West Africa is possessed of *majestas* in the full sense of that term; in other words, it is not a sovereign and independent state. But *majestas* operating internally may by our law be sufficient to found a charge of high treason, in spite of the fact that its external operation is considerably curtailed. And where the internal characteristics of sovereignty are present; where a community is organized under a government which has the power of making laws and enforcing them, then *majestas* adequate for the above purpose must reside either in the government of that community or in some other government of which it is subject. *Voet's* description of a subordinate ruler as one who is under the *majestas* of another is accurate. A duly constituted government must either possess such *majestas* itself or be entitled to the benefit of the *majestas* of the Power which it obeys. Were it otherwise, a subordinate ruler might be attacked with impunity, as far as liability for treason is concerned. And in this instance the Mandatory is *de facto* and *de jure* the government of the territory. It has the sole power of legislation; there is no other law-making authority. And it may administer the country as an integral portion of the Union. So that there has been called into existence a government which has full legislative and administrative powers within a defined territory, and is not itself subject to the *majestas* of another state. The League is not a state, nor do the Principal Powers constitute one. That government has, by virtue of treaty obligations consented to certain limitations of its powers. But those limitations are not inconsistent with the possession of *majestas* within its own territory; and such *majestas* which formerly resided in the German Government must now reside in the new authority. There is no other state or power in which it can be vested. In case of an attack with hostile intent by an inhabitant upon the Government of South-West Africa it would be impossible to charge treason against the League of Nations, or against the Principal Allied and Associated Powers; it could only be charged against the Mandatory. Finally, it is unnecessary to institute a comparison between the position of a mandated territory and the position of a Dominion; though such an investigation would raise interesting questions as to how far the Dominions, thanks to the elasticity of the British Constitution, have progressed along the path of nationhood. The international *status* of the Union is clearly consistent with the possession of *majestas* by its Government in the capacity of Mandatory. For the Union of South Africa is not only a signatory to the treaty, but is a Member of the League of Nations, and as such an independent unit of the Assembly. It has therefore an international *status* which upon the selection of the Union Government to administer South-West Africa entitled that Government as Mandatory to claim the attribute of *majestas* to the same extent as any other Power acting in the same capacity. In my opinion the Government of the territory of South-West Africa, notwithstanding the curtailing provisions of the treaty and the

mandate, is possessed of *majestas* within its own territory, and a charge of high treason will therefore lie in respect of an attack made upon it by an inhabitant with hostile intent. The Executive Government of the Union of South Africa is by the South Africa Act vested in the King and is administered on his behalf by a Governor-General acting under the advice of an Executive Council. That being so, the allegation in the indictment that the accused owed allegiance to His Majesty King George the Fifth in His Government of the Union of South Africa was not in my opinion open to objection. Indeed, it was not objected to on appeal. I therefore agree substantially with the very able reasons of the trial Judge pronounced when the original indictment was objected to.

" I think the question of law reserved for our opinion must be answered in favour of the Crown, and that the appeal fails."

Kotzé, J.

The line of reasoning followed by Mr. Justice Kotzé is on the whole similar to that of the Chief Justice, and need not be given at length. Some portions of his Judgment however introduce additional matter and are here given.

" We have simply to consider and answer the question whether, upon the face of the indictment, an inhabitant of South-West Africa can be legally charged with treason against the government of the Mandatory " (p. 2).

. . . . . .

" We have thus presented to us an interesting and important question of a legal as well as of a political nature. But it is in its former aspect that we can alone deal with it " (pp. 2 and 3).

. . . . . .

" It is very generally admitted that all sovereign power is derived in the last resort from the people and that the right to exercise this power is conferred by delegation from the people. All writers on public law lay down that the distinctive mark of sovereignty or supreme power whether exercised by a single individual or a body of individuals, consists in the circumstances that this power is independent of or not subject to the will of any other " (p. 3).

. . . . . .

" From what has been premised it will appear that sovereignty may exist in different degrees. A given nation or country may possess complete and full sovereign rights in every respect ; or, while enjoying complete internal independence, it may externally, in some particular respect owe a duty to some other state. In both these instances the nation or country will be considered a sovereign state. Again, in regard to half sovereign states, which are independent within the territorial limits but not externally, instances may occur where, even internally, the exercise of one or other sovereign right is controlled by another state.

" We may now have to adjudicate upon a case which is novel, and one, as it were, *sui generis*. But, after all, there is nothing surprising in this. If law be progressive, how much more so are politics and the public opinion of civilized nations. In reality, the introduction of a system of mandates by the League of Nations, like that of a combined league itself, is not quite a new notion. There is, for instance, the case of the Belgian Congo ; and the practice of granting

to corporate bodies a Charter, conferring on them authority to govern and administer given territories in Asia, Africa and elsewhere, is a matter of history. We have, as instances of this, the case of the British East India Company, of the Dutch West and East India Companies, and, in our own day, the Charter granted in 1889 by the Crown to the British South Africa Company, under whose rule Northern Rhodesia is still being governed.[1] So there is the well-known instance of the commission issued to Colonial Governors. No doubt there may be, and there are, important differences between Protectorates and Colonies, and between both of these and a Territory mandated by the Council of the League. But there is this essential agreement between all. The grant or charter to the Corporate Body and the commission to the Governor, like the mandate before us, are but written instruments conferring authority to execute powers of government and administration in the territory to which they relate. In origin the charter and commission may differ from the mandate, as they may differ from each other in their terms. But they all agree in the circumstance that they confer authority to govern, which, from the very nature of the case, carries with it and creates rights and obligations.

" In the present instance we have to deal with a mandate, conferred not by a sovereign state in an ordinary and accustomed way, but with one of a high and peculiar kind entrusted by a League of associated civilized nations, created by a treaty after the conclusion of the greatest war in history, to an ' advanced nation ' forming one of the constituent Dominions of the great British Commonwealth of Nations. A new case has therefore arisen, calling for judicial interpretation and decision. In giving it our consideration, we must bear in mind that the law is not so stereotyped that its well-settled and generally acknowledged principles cannot be applied to new circumstances. It was well said by Lord St. Leonards that ' the law moulds itself to the wants and wishes, and varying exigencies of mankind, and properly so, but the principles of law do not vary, though they may be modified in the application of them to new cases as they arise ' (*Egerton* v. *Earl Brownlow*, 4. H.L.Ca., p. 232).

" The authority conferred by the mandate is of the greatest importance and far-reaching effect. It embraces the full power of administration and of legislation over South-West Africa as an integral portion of the Union. This imports the right as well as the responsibility of government in all its branches and functions. The view put forth, that ' it can confidently be said that the wording of Article 22 is inconsistent with the idea that the Mandatory will possess sovereignty in the mandated territory ' is not correct, for the fact is there that the authority conferred imports the exercise of sovereign rights. Nor does it seem correct to assert that ' the *status* of the Mandatory is defined by its obligations and not by its rights, for it is the League of Nations and the subject races which acquire rights against the Mandatory, who assumes obligations to both of them ' (*Report of the 29th Conference of the International Law*

[1] Northern Rhodesia is no longer administered by the British South Africa Company. The government of that territory was transferred from that Company to the Crown under the " Northern Rhodesia Order-in-Council, 1924." S.R. and O. 1924 No. 324 (see also No. 325), (February 20, 1924).

The territory is now governed by a Governor assisted by an executive and a Legislative Council, see Northern Rhodesia Government Gazette for March 21, and April 1, 1924.

Association, 1920, p. 128 ff.). I venture to think, with every respect, that this statement is misleading. It may be quite true that the Mandatory, representing the nation most directly concerned in the well-being and progress of the territory, has undertaken a trust in regard to South-West Africa, and is, in that capacity, responsible to the League for the good government of this territory. Also that in exercising its function of administration it has to observe the stipulations and directions connected with it as laid down in Article 22 and in the terms of the mandate. It may likewise be that the League, and not merely the subject races but all the inhabitants have acquired certain rights against the Mandatory. All this, no doubt, indicates an important difference between a mandated territory and a Protectorate. . . . But that merely represents one side of the position. It is not true that only duties and not rights of a Mandatory are contemplated. The full power of administration and legislation conferred, subject to the modifications and directions imposed by the mandate, necessarily embraces rights as well as duties. It confers certain wide and most important rights on the Mandatory, which must be deemed to be of a sovereign character. The power of legislation, i. e. of prescribing, revoking and enforcing laws over a people, has always been, and is, regarded by all writers on the subject, including our Roman Dutch Jurists, as for instance, Grotius, Gudelin, Bort and Huber, as one of the principal rights or attributes of sovereignty (*Summa Potestas seu Majestas*).

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" As the delegated authority of full administration and legislation vests in the Union of South Africa the right of government, it necessarily follows that allegiance or obedience by the inhabitants, European as well as native, is due to the laws and lawful directions of the Mandatory.

. . . . . .

" The Mandatory, being responsible for the good government and security of the mandated territory, is bound to maintain law and order in it, and the inhabitants owe obedience to the law. Both the common law and the statute law of the Union of South Africa, applying to the mandated territory, recognize the crime of treason. As pointed out by this Court in *Rex* v. *Erasmus* and *Rex* v. *Viljoen* (1922, App. Div. 73 and 90) treason (*perduellio*) and sedition fall under the *crimen Laesae Majestatis*, there being however this essential distinction between them. To constitute treason the conduct or acts with which an accused person is charged must be shown to have been committed with a hostile intent. It follows that there may be seditious acts, which fall short of treason, and yet would come under the *crimen Laesae Majestatis*. As I had occasion to observe in the case of *Rex* v. *Erasmus*, the qualification ' hostile intent ' is not merely confined to acts, which are connected with an enemy of the state or government from without, for hostility can also be stirred up and exist from within, as the authorities clearly demonstrate. Nor is it necessary that the hostile intent should contemplate the total overthrow of the government, for acts may be done which, while not manifesting any intention to subvert the government as such, yet amount to treason, as where a person out of malice and hostility to the ruler, or to some act of maladministration, attempts to oppose and resist his authority. Pothier has very crisply expressed this where he lays down that treason is committed *quum quis hostili animo statum publicum in totum vel pro parte evertere*

studet (Pand. 48. 4. 1). And here I may repeat what I said in the case of *Erasmus*: 'The principle of our law in regard to treason is not based on an antiquated notion, but is founded in reason and justice, and in its main feature is in accordance also with the English law, which depends largely upon Statute. To levy war, for instance, against the Sovereign amounts to treason, and this offence of levying war may be committed even by a few persons, who devise or intend to force the King by means of acts of violence, to change his counsels, or to overawe the Houses of Parliament by violent measures, directed against the property of the King, the public property, or the lives of His Majesty's subjects' (*Rex* v. *Gallagher and Others*, 1838, 15 Cox, 291).

"As the obligation to maintain law and order rests on the Mandatory, it is its duty to suppress all disturbance of these, and to provide for the public safety, as well as to punish offenders. All the inhabitants of the mandated territory are subject to its laws and owe them obedience. All offences, therefore, are triable and punishable by these laws. The *crimen Laesae Majestatis*, like the lesser kinds of public violence, forms no exception to this, and falls within the same category. The Mandatory, who is The King for and on behalf of the Union of South Africa, is clothed by the mandate with sufficient *status* and *Majestas* so that treason, as regulated by the local law and as set out in the indictment, can be committed against His Majesty in the capacity of such Mandatory in the delegated or mandated government of South-West Africa. I therefore agree that the answer to the question submitted must be in the affirmative."

Comment upon such well reasoned judgments is almost unnecessary save to remark that they seem to be based upon precedent and the opinions of international jurists, and to be in accordance with the demands of public policy. After all laws grow, or are enacted, not to make life more complex, and the art of government more difficult, but to regulate the conflicting interests of men, and to simplify as far as possible their social, economic, and political intercourse. If the law were to provide a hiding-place for the wrong-doer because of some technicality, such as a supposed absence of some one or more of the attributes of sovereignty, then it would indeed merit much of the abuse that is so often levelled at it by those "unlearned in the law".

NORMAN MACKENZIE.

MIXED TRIBUNALS: EGYPT

CAIRO COURT OF FIRST INSTANCE

Finck v. *Minister of the Interior.*

Martial law proclaimed by military authorities in occupation of a country in time of war—Deportation of enemy individuals and sequestration of enemy property —Action against the Government of the country under occupation.

HEINRICH FINCK, a German, carried on business as a bookseller in Cairo. He left Egypt on October 15, 1914, and entrusted the management of his bookshop to two persons, Schmidt, a German, and Hofmann, an Austrian. On November 2, on the outbreak of the war with Turkey, the Commander-in-Chief

of the British Army of Occupation in Egypt placed Egypt under martial law. A short time later Schmidt and Hofmann were deported from Egypt and interned at Malta, the plaintiff's property in Egypt was sequestrated and all the stock-in-trade was sold. The plaintiff claimed for a loss of £E22,538. The action was brought against the Egyptian Government upon the ground that in calling on the British Commander-in-Chief to undertake the defence of Egypt, as had been done by a decision of the Council of Ministers on August 6, 1914, the government had acted wrongfully. The defence of the country was entrusted to a power at war with Germany, and the rights which the plaintiff enjoyed under the capitulations were not reserved.

The Egyptian Government repudiated liability upon the ground that the British military authorities were alone responsible for the internment of Schmidt and Hofmann and the sale of the plaintiff's property; and that the Egyptian Government were not responsible for the acts of the military authorities.

On November 24, 1924, the Court dismissed the claim and pronounced the following judgment:

As to the facts:

By a writ served by the bailiff A. Giaquinto dated July 17, 1924, the plaintiff summoned the defendant to appear before the civil chamber of this tribunal at the sitting on October 20, 1924, to answer a claim framed as follows:

Whereas the plaintiff up to October 15, 1914, lived at Cairo, Rue Emad-El-Dine, where he managed the "Librairie Diemer, Finck & Baylander, successeurs," Rue Kamel, of which he was the owner;

Having left Cairo with his family on October 15, 1914, furnished with a passport in good order to proceed to Europe, he entrusted the management of the said bookshop to Messrs. Hermann Schmidt, a German, and Karl Hofmann, an Austrian;

Whereas in the month of October or November, 1914, the last-named were requested by the Cairo police to surrender themselves to the British troops at Cairo and without being allowed any time in which to place in safety the property which had been entrusted to them they were deported to a place outside Egypt and there detained;

Whereas at a later date all the plaintiff's property in Egypt was seized by the British sequestrator, with consequent loss and damage amounting to £E22,538.800 as will be shown in due course;

Whereas all the above was caused by the wrongful act of the Egyptian Government as is conclusively shown in the writ of summons;

The Egyptian Government should therefore be condemned to pay to the plaintiff the sum of £E22,538.800 with costs and expenses.

The case inscribed in the Rôle Général sub. No. 9389 of the 49th Année Judiciaire was listed and called for hearing at the above-mentioned session of October 20, 1924, and thereafter at the session of November 17, 1924, when there appeared Maître Marcus for the plaintiff who spoke to the facts of the case and in pursuance of his written arguments asked for judgment in favour of his claim;

In answer to the Tribunal, he declared that his client was arrested on November 15, 1924;

He asked for judgment in favour of his claim.

Maître Rossetti for the defendant asked that the suit be dismissed upon the ground that the Egyptian Government had never authorized the General Commanding in Chief the Army of Occupation to take the measures for which the plaintiff now sought to hold the defendant responsible ;

In answer to the Tribunal, he said that Schmidt, who was then in hospital, left Egypt on December 1, 1914, and that he had asked for permission to leave for Europe on November 15, 1914 ;

The Procureur Général asked for the dismissal of the claim on the ground that the measures of which the plaintiff complained had been taken by the military authorities for the protection of the Army of Occupation and at a time when martial law had been proclaimed in the country by order of the General Commanding in Chief the Army of Occupation.

By written pleadings forming part of the record :

Maître Conrad Marcus for the plaintiff asked for judgment in accordance with the summons initiating the proceedings ;

Maître Rossetti for the defendant asked

that the claim be declared to be ill-founded ;

that the plaintiff be condemned in all costs and expenses including the fees of the Egyptian Government.

AS TO THE LAW :

What must the tribunal decide ?

IN REGARD TO THE EXPENSES, what order should be made ?

The Tribunal gave judgment as follows :

After consideration of the matter in accordance with the law, acting within its civil jurisdiction :

Having regard to the summons dated July 17, 1924, whereby Heinrich Finck, a German subject, sued the Egyptian Government for a sum of £E22,538.800 as damages ;

Whereas he alleges that on August 1, 1914, when war broke out between Germany and France, England and Russia, he was in Cairo and was the proprietor of the " Librairie Diemer," which was a flourishing concern ;

On August 6, 1914, the Egyptian Government, by a decision of the Council of Ministers of that date, called upon the Commander-in-Chief of the British troops in Egypt to undertake the defence of Egypt against any aggression by a Power at war with His Britannic Majesty ;

Whereas he inferred that, on account of his German nationality, he was in danger of being deprived of his liberty in Egypt when that country was occupied by English troops responsible for its defence, and for that reason he voluntarily left Egypt on October 15, 1914, after having entrusted the management of his bookshop to two attorneys—Hermann Schmidt and Charles Hofmann, who were German subjects like himself ;

Whereas immediately after the assumption by the Commander-in-Chief of the British forces, by a proclamation dated November 2, 1914, of responsibility for the defence of Egypt, an agent of the Egyptian police in Cairo, acting on behalf of an officer of the British army, requested his two above-named attorneys to appear before the said officer at the Kasr El Nil Barracks, then occupied by British troops ;

Whereas his two attorneys on arrival there were immediately placed under

arrest, solely on account of their German nationality, and were then placed on board a British vessel and taken to Malta, where they were interned until the end of the war ;

Whereas while he was absent from Egypt and his attorneys were interned at Malta the British military authorities in Egypt placed his bookshop under sequestration ;

Whereas the sequestrator sold all the stock-in-trade of the shop ;

Whereas the proceeds of the sale having been completely absorbed by the costs of the sequestration and of the sale, nothing whatever was left for him ;

And whereas having been deprived of the value of his bookshop, which in 1914 was worth £E22,538.800, by the wrongful act with which he charges the Egyptian Government, which consists in having (1) entrusted the defence of Egypt to a Power already at war with Germany, (2) omitted in so doing to reserve the rights of Europeans which flow from the Capitulations and which include the right of a European, in this case a German subject, entitled to the benefits of the Capitulations to be liable to arrest or to have his property confiscated by his own Consulate only, he is entitled to claim as damages from the Egyptian Government the value of his bookshop in compensation for the injury caused to him by the above-mentioned wrongful act with which he charges the Egyptian Government ;

Whereas the Egyptian Government in its pleadings, without repudiating or accepting the decision of the Council of Ministers dated August 6, 1914, which *is nevertheless the basis of the claim for damages*, confines itself to replying that inasmuch as the internment of the plaintiff's attorneys, as also the sale of his bookshop, were spontaneous and personal acts of the British military authorities, for which the Egyptian Government could not be held responsible in law, since those authorities were never set up in power by it ;

Whereas, firstly, the existence of the decision, alleged to be wrongful, of the Council of Ministers of August 6, 1914, cannot be denied, since that decision was promulgated by insertion in the supplementary Official Journal No. 98 of August 6, 1914, and was thereby duly published and made binding upon all the inhabitants of Egypt ;

Whereas further it is necessary to define the juridical nature of the decision of the Council of Ministers of August 6, 1914, in order to see whether it can legally be made the basis of an action for damages ;

Whereas the plaintiff complains that on August 6, 1914, the Egyptian Government committed a wrongful act and exceeded its rights, in delegating to the Commander-in-Chief of the British Army of Occupation in Egypt its powers in the matter of the defence of Egyptian territory against any attack from states at war with His Britannic Majesty, and did so : (1) although Egypt was not at war with any state whatsoever, which rendered the fear of attack illusory and proved the futility and the arbitrary and improper nature of this delegation of power ; (2) to a Power already at war with Germany ; (3) without having reserved the rights resulting from the Capitulations for subjects of the Capitulatory Powers, including German subjects, the chief of such rights being the privilege that the person and property of the subject are placed under the protection and authority of his Consulate to the exclusion of the local authority ;

Whereas the plaintiff contends that the above-mentioned wrongful act of the Egyptian Government, which cannot even be justified on grounds of neces-

sity, *constitutes a violation of international law* since it resulted in Egypt being placed under the régime of martial law by the British military authority, in the internment of his two attorneys and in the disastrous sale of his bookshop by the English military authority, solely on account of the German nationality of his two attorneys and himself, in defiance of the Capitulations which, in the absence of a state of war between Germany and Egypt, could neither be abrogated nor suspended, and must be observed.

Whereas it is, to say the least of it, presumptuous of a plaintiff of German nationality to accuse the Egyptian Government of having in November, 1914, *violated international law* by interning the plaintiff's two attorneys in Egypt because of their German nationality and by placing the plaintiff's bookshop in Egypt under sequestration on the same date because of the plaintiff's German nationality, when *it is a matter of history* that long before November, 1914, the German Government had itself gravely violated international law :

(1) By causing the bombardment by the cruisers *Goeben* and *Breslau* on July 30, 1914, before the declaration of war with France of August 1, 1914, of the French towns, Bône and Philippeville, which neither then nor since were bases of supply or fortified places, properly so called ;

(2) By interning, as from August 1, 1914, solely on account of their nationality, all French citizens who happened to be in German territory, whether residents or merely tourists, and by including in such internment not only those whose age and sex qualified them to take arms against Germany, but even women and children whose presence in Germany could not constitute any danger or expense, since, if Germany was unwilling to feed them, she should have granted them time to leave the country, in accordance with the most elementary principles of international law, which were moreover admitted as such by the plaintiff when in his pleadings he invoked those very principles in complaining that the Egyptian Government did not request his two attorneys to leave the country instead of interning them ;

(3) By violating the neutrality of Belgium from the beginning of August, 1914, and forcibly traversing the territory of that neutralized State in order the more quickly to invade France and to attack the latter at a point in her territory which according to international law she had a right to regard as immune ;

(4) By causing her submarines from 1914 onwards to torpedo the merchant vessels and even the mail steamers of neutral States ;

Whereas both by reason of the above-mentioned violations by Germany of the principles of international law, and by reason of the geographical position of Egypt whose territory is crossed by the Suez Canal and commands the means of communication between Europe and the East, and by reason of the presence in Egypt of a British Army of Occupation, it was natural, wise and prudent of the Egyptian Government, given the existence of a state of war between the central European Powers and the Allies, and having regard especially to Germany's methods, until then unknown in warfare, to envisage an attack upon Egypt and to guard against it by taking the necessary steps for the defence of the territory and the safeguarding of her existence ;

Whereas the fear of an attack upon Egypt, although not then at war, was by no means illusory, as alleged by the plaintiff, since such an attack was made in February, 1915, by a Turkish army corps under the command of German officers ;

Whereas Egypt, being manifestly entitled and obliged to defend her territory and her national existence and to that end to take, *even in time of peace*, all the steps which she might think necessary, had an undoubted right, if she thought she could not herself ensure her defence and her existence, to turn to the military power of another State, and especially to that of the Power which had an army in occupation of her territory ;

Whereas it was thus to provide for the defence of Egyptian territory against possible attack that the Egyptian Government, who were responsible for the defence of Egypt, by a decision of the Council of Ministers, dated August 6, 1914, delegated to the Commander-in-Chief of the British army in Egypt its right of organizing the defence of that country ;

Whereas it is this delegation of power which the plaintiff declares to be a wrongful act on the part of the Egyptian Government, alleging :—

(1) that Egypt, being then, although she had obtained her autonomy, an integral part of the Ottoman Empire, the Egyptian Government was not legally entitled to pursue a foreign policy different from that of Turkey, then a neutral State, or to range Egypt on the side of a foreign Power already at war with Germany, and that in consequence the said delegation of power of August 6, 1914, is invalid because it was *ultra vires* ;

(2) that Egypt, as a dependency of Turkey, being bound to Germany by the Capitulations, the Egyptian Government violated the Capitulations by not reserving to German subjects their capitulatory rights when on August 6, 1914, it delegated its powers, as above set out, to the Commander-in-Chief of the British forces in Egypt,

and that this resulted in the internment, by order of the British military authorities, of his two German attorneys and the sale of his bookshop ;

Whereas the first argument is a complete misconception of the rights which Egypt had gradually, and especially since the reign of her first Sovereign, Mohamed Ali, obtained from the Sublime Porte, and of which, without mentioning them all, it will suffice to recall that in 1914 Egypt as a state was an entity distinct from Turkey, that she was an autonomous state having as her head a Sovereign in a recognized line of succession, that she had power to legislate, to conclude conventions with other states, to levy taxes, to coin her own money, to maintain an army and a fleet, to draw up her own budget and to carry on her own administration, and that the only bond between herself and the Sublime Porte was the payment of an annual tribute ;

whence it follows that Egypt had a right to pursue a foreign policy different from that of Turkey ;

and, consequently, that she had a right to range herself, at her own risk and peril, on the side of a foreign Power already at war even with Turkey and, *a fortiori*, on the side of a Power at war with Germany whose vassal Egypt has never been ;

Whereas, in regard to the second argument, by the decision of the Council of Ministers dated August 6, 1914, the purely political character of which is admitted by the plaintiff in his pleadings, the Egyptian Government did not confine itself to entrusting the defence of Egyptian territory to the Commander-in-Chief of the British Army of Occupation, but also by that same decision promulgated in the Official Journal of August 6, 1914, No. 98, enacted a series of measures for the purpose of ensuring the security of Egypt, such as the

prohibition of commercial intercourse with the enemies of His Britannic Majesty, of the payment of debts owing to them, of the transmission to them of money or goods, of the effecting of insurances with an enemy company or the payments of premiums thereon, and the prohibition upon enemy ships to touch at Egyptian ports under penalty of the capture of the vessels.

In short, the Egyptian Government by this decision of August 6, 1914, regarded itself and acted publicly and unequivocally as if it was *at war with the enemies of His Britannic Majesty* and, therefore, at war with Germany, which was then already at war with England :

Whereas treaties with an enemy state are, if not destroyed or annulled, at least suspended for the duration of the war :

Therefore the Egyptian Government did not violate the Capitulations on August 6, 1914, when, in declaring itself at war with Germany, it treated the Capitulations as suspended *vis-à-vis* German nationals in accordance with the laws of war, and for that reason did not reserve to them the privileges flowing from the Capitulations when it delegated the right to defend Egypt to the Commander of the British forces ;

Whereas, to sum up, the decision of the Council of Ministers of August 6, 1914, was in fact and in law an actual declaration of war against Germany, and whereas Egypt by her declaration of alliance with England of August 6, 1914, was at war with Turkey at the moment when on November 5, 1914, Turkey allied herself with Germany, it is seen why by a proclamation of November 6, 1914, the Commander of the British troops in Egypt made an announcement to that effect in Egypt, and why in February, 1915, Egypt was attacked by Turkey ;

Whereas it is proved by the above that the decision of the Council of Ministers of August 6, 1914, to entrust the military defence of Egypt to England, then at war with Germany, resulted in placing Egypt at war with Germany ;

Whereas the result of this delegation of power to the Commander of the British Army of Occupation was the proclamation on November 2, 1914, by the Commander-in-Chief of the British troops in Egypt, placing Egypt under martial law, applicable equally to foreigners and to natives ;

and Whereas the application of this régime caused the British military authorities : (1) to intern the two attorneys of the plaintiff on account of their German nationality ; (2) to place under sequestration, and later to sell, the Plaintiff's bookshop on account of his German nationality ;

Whereas the basis of the Plaintiff's claim for damages against the Egyptian Government is the decision of the Council of Ministers of August 6, 1914, which was the cause of the two injuries mentioned above for which he claims compensation ;

Whereas the decision of the Council of Ministers of August 6, 1914, resulted, as has already been said, in Egypt being at war with Germany ;

Whereas a declaration of war is in law an act of the Sovereign Power and consequently appertains to the Sovereign ;

Whereas if the sovereign power is vested in the Sovereign it is exercised through his Ministers, of whom the Council of Ministers is the constitutional organ ;

Therefore the decision of the Council of Ministers of August 6, 1914, which is the subject of complaint, emanated from the only authority competent to make it, and was within its jurisdiction and not within the jurisdiction of any other authority ;

Whereas in law acts of this nature are called " acts of state " ;

and Whereas in principle an act of state *cannot be made the basis of an action for damages* in respect of the injury which it causes :

Therefore the claim is inadmissible :

FOR THESE REASONS THE TRIBUNAL,

After hearing both parties, and sitting in public audience, in its civil jurisdiction of first instance, the Public Prosecutor having been heard :

Rejecting all other claims or arguments :

Holds that the decision of the Egyptian Council of Ministers of August 6, 1914, which delegated to the Commander-in-Chief of the British troops in Egypt the power of organizing and ensuring the defence of the territory and existence of Egypt against any attack by a Power then at war with His Britannic Majesty, is an act of state :

Holds that an act of state cannot in law be the basis of an action for damages on the part of the individual who is injured thereby :

Finds that the Plaintiff's claim for damages, based on the act of state of August 6, 1914, is inadmissible :

Condemns the Plaintiff in costs, counsel's fees being fixed at 400 Piastres Tarif.

Thus adjudged and declared at the public session of the Mixed Tribunal of First Instance of Cairo, sitting in its civil jurisdiction, the twenty-fourth (24) of November, One Thousand Nine Hundred and Twenty-four (1924) ;

PRESENT

M. M. GIRAUD, President.

Mohamed Bey Ezzat and Gautero—Judges :
Mahmoud Bey Sadek—Chef du Parquet (Procureur Général).
Ch. Koncewicz—Registrar : and
Gad Fehdé—Interpreter.

(signed) GIRAUD, President.
KONCEWICZ, Registrar.

REVIEWS OF BOOKS

Hall's International Law. Eighth Edition by Prof. A. Pearce Higgins. Oxford University Press. xlvii + 952 pp. (36*s.* net.)

When, eight years ago, Professor Pearce Higgins prepared the seventh edition of *Hall's International Law*, the great war was still raging. It was to him, as to every international lawyer, a tragic epoch ; in his preface he described it, in a pregnant phrase, as " a civil war among the society of states." But he was never among those who would have had us believe that international law had ceased to exist. On the contrary, he believed that after the war it would be possible to " strengthen the operation of the fundamental principles on which the present structure of international law is based " ; [1] and that, to achieve this end, there would arise " out of this welter of blood a new society of states, knit together by closer bonds and willing to submit their disputes to the legal decision of some tribunal." [1]

History has justified his faith. " The most important consequence of the treaties of 1919, so far as international law is concerned," he is now able to write, " was the creation of the League of Nations and subsequently of its necessary supplement, the Permanent Court of International Justice." And for him the importance of this consequence is great. For as a result of the peace treaties and of the establishment of these international organs, " wholly new chapters " are in his view being added to international law, and its whole framework is being strengthened and developed. Most of what is new in the present edition relates to these developments, and it is naturally in this part of it that its greatest interest lies. Every reproduction of the works of Hall must in itself be of importance ; but it is primarily for the light which Professor Pearce Higgins throws on the present changing condition of international law, for the guidance which he gives in an important and uncharted field, for the way in which he fits his new material into the old system, that his present volume will be studied and valued.

It must be said at once that without the writing of a completely new book as a supplement to Hall's own text, without destroying the whole balance of the old and new, the work could hardly have been better done than it has been by the learned editor of this volume. For this reason, quite apart from his service in once more making Hall readily available to the student, we must be deeply grateful to him.

It is superfluous, indeed it would be foolish, to attempt any new appreciation of the basic text. It suffices to read again his introductory chapter—in itself one of the classics of international law—or his discussion of the right of self-preservation, of intervention, of *rebus sic stantibus* and the voidability of treaties, of the commencement of war, to realize anew that Hall must always remain among the masters. This basic text Professor Pearce Higgins has commented and expanded with learning, acumen, and discrimination. He has

[1] Preface to Seventh Edition, 1917.

inserted his new material into the general system in the place where it belongs, and he has compounded old and new together without confusion into a single intelligible and comprehensive whole. On many subjects he has done new and original work that will be of great assistance to the student; his paragraphs on international servitudes, on the international position of the Dominions, on air law, on wireless telegraphy, may be cited as examples. Naturally enough, not every one will agree with all his views. On the "new principle" of the mandates system, to take one instance, he differs from recent writers. He holds, of course, that this principle "excludes annexation and incorporates a species of trusteeship"; but he holds also that the Mandatory Powers derive their title exclusively from the Principal Allies, and that they divide the "sovereignty" over the mandated areas with the League of Nations—both opinions which have been disputed. Similarly some writers would contest his view that the Corfu incident between Italy and Greece threw doubt on the efficacy of articles 12–15 of the Covenant of the League. But the fact that there is room for difference of opinion on such points as these in no way detracts from the value either of Professor Pearce Higgins's new paragraphs, or of the volume as a whole, which, with its up-to-date information and its mine of useful references, will be indispensable to every serious student of international law.

But having said so much, the conscientious reviewer may be permitted to give expression to a doubt and to a hope. The doubt is whether the present is not the last commentated edition of Hall that will serve a useful purpose; the hope is that Professor Pearce Higgins, and other English publicists who may follow his lead, will in the future no longer confine themselves to commenting the classics of the past, but will boldly set out to expound *de novo* the new system of international law as it now exists. The thesis need not be defended at any length; any reader who makes a careful perusal of the present volume will find for himself the grounds on which it rests. Nearly everything that Hall says is, no doubt, of enduring value, and on many matters his opinion must still be to-day evidence of weight in determining what the rules and principles of international law really are. But much of it has begun to "date"; some has even a definitely archaic sound. His introductory chapter, for example, is no longer a complete statement of the argument for the strictly legal character of international law. His remarks on intervention no longer carry full conviction; for the "rudimentary social bond" among states of which he speaks has been so developed as to have changed in nature. Few would agree with all that he says of general treaties as a method of creating conventional international law; still fewer with his paragraphs on arbitration. His conclusions concerning the right of transit on international rivers have not been supported by the subsequent development of international law, nor do they accord with the notes which Professor Pearce Higgins is compelled to add.

In the second place, the mere fact that an editor is commenting a text deprives him of that freedom which is now essential for the proper discussion of the modern developments of international law. Not only considerations of space, but the very nature of his task, has prevented Professor Pearce Higgins from giving us much of what we want from him. Under the title "Treaties of Guarantee" we look to-day for a detailed study of the meaning and juridical significance of Article 10 of the Covenant, certainly the most important treaty of guarantee ever made. Under "Measures of Constraint short of War" we

need—how urgently we need it the Corfu crisis showed—a full discussion of the effect of Articles 12–15 on the right to take measures of coercion. Under "Ratification of Treaties" we need to know the bearing—and again, indeed, the meaning—of Article 18. These examples could be multiplied almost without end. Such points as these, of practical as well as of great theoretical importance, have not yet been adequately discussed even in the current annual and quarterly reviews. They need such discussion, but they need more: they need careful, even meticulously careful, study and exposition, not only as isolated problems, but also as an integral part of the newly transformed, living and changing system of international law which states to-day obey. All students of international law are under an obligation to Professor Pearce Higgins for the volume he has just given them, but their hope may be voiced that he and his colleagues will continue in the future, as English publicists have done so often in the past, to lead constructive thought on international law, and to promote, so far as scientific writers legitimately can, the development of the society of states towards the common ideal of an international system based on legal justice.

P. J. Noel Baker.

Air Power and War Rights. By J. M. Spaight, O.B.E. Longmans, Green & Co. 1924. 8vo. ix+493 pp. (25*s.*)

Mr. Spaight's book on the law of air warfare is a valuable contribution to the literature on the newest field of international law, in its supply of well-arranged *data*, theoretical and practical, drawn from the experiences of the Great War. The progress made in the science of the subject in the last twelve years—reckoning from the time when the advance in air navigation began to take a systematic course—is amazing. Mr. Spaight's volume shows how easily the existing rules of the laws of war adapt themselves to this new branch of military activity and gives an admirably clear and interesting exposition of the whole subject under familiar heads. The war, of course, provided a practical test of propositions previously advanced by jurists and students; and it will have accelerated the evolution of a systematic body of rules, in which both the military and humanitarian sides of the question can find their proper place and be correlated to each other. Before the war the general principles of air law, e. g. the sovereignty of a state over the air above it, had been evolved in drafts prepared by bodies of jurists such as the Institute of International Law and the International Law Association, and by municipal legislation: since the war the Air Navigation Convention of 1919 (rules for time of peace) and the draft Air Warfare Rules, drawn up by jurists delegated by the Allied Powers at The Hague in 1923, have carried the systematic regulation of the subject into a definite stage of precision. These draft rules apply the laws of war on land to cases not provided for, and apply the maritime law or the general law of war where the rules indicate that they are applicable.

The author emphasizes as a starting-point the need of special rules of air warfare, and the inadequacy of mere additions or superimpositions to the laws of land and sea war, on the grounds that it is impossible to separate air operations over sea and over land, and that certain questions, e. g. the law of neutrality and the status of private property, are differently treated by these separate systems; obviously such questions as air bombardment of undefended cities, with its

consequences to the enemy civilian population, require special regulation. There is, moreover, such ambiguity in the use of terms such as " military necessity," " reprisals," and " usages of war," that only express provisions as regards air operations can get rid of uncertainty as to what will be recognized as legitimate or not. The rights of combatants and non-combatants should be defined without having to fall back on the unsatisfactory position that illegitimate action can be countered by similar illegality. Such special considerations of aerial warfare conditions cannot fail to react on those of sea and land warfare, and should facilitate a greater uniformity of standpoint in all departments of war activity. The author is careful to cite comparatively under each head of the subject the rules of land and sea warfare which give useful analogies and often valuable direct precedents.

The arrangement of the book follows that of the ordinary heads of the laws of war as applicable to air warfare : opening of hostilities, status of combatant aircraft, air combats, ruses, special ammunition, bombing of military objectives, under the draft Air Warfare Rules, civilian property, hospitals, historic monuments and other protected buildings, special missions of the air, propaganda by aircraft, enemy casualties, white flags and armistices, aircraft and enemy populations, enemy civil aircraft, neutral aircraft, aircraft crews and passengers, belligerent entry into neutral jurisdiction, neutral volunteers and neutral supplies to belligerents, and operations by aircraft against merchant vessels. The author's learned exposition of each head of the subject, with its appropriate principles illustrated by the precedents of the war, and with useful summaries of his conclusions, makes the book a really interesting presentation of the whole system ; and it brings out the salient and peculiar features of air warfare as shown by the late war.

A hopeful and interesting characteristic is that air combat has revived the chivalrous spirit in war, due to the individual contests which are the rule. In the war both sides showed a high standard of conduct in " playing the rules of the game," but the author points out that such consideration must not conflict with the military duty of attacking and destroying a disabled adversary if on his own ground, and that giving quarter or taking surrenders in the air are impracticable, though escape by parachute may be respected. He states his conviction that air warfare with its military consequences must be accepted as part of the ordinary warfare of the future, and that humanitarian considerations must be brought into line with the necessities of war.

As regards the use of special ammunition against aircraft, either by one craft against another, or from the ground, there is the difficulty that this, though legitimate, involves risk to the airman against whom it is not permissible. The draft Air Warfare Rules declare against prohibiting the use of incendiary or explosive projectiles against aircraft, but the practice of the war favoured such prohibition, and the author would restrict its use to attack on balloons and airships.

The limits of the right of bombardment from the air and the method of reconciling the right of attack upon military objectives wherever situated with the due regard for human life in the civilian population near by, are again questions of great difficulty, but the author would make it obligatory to have all military establishments clearly defined and separated from civilian dwellings, and allow only attacks by night against them.

As regards devastation of non-military property, he would allow it if unattended by loss of life, or possibly even if involving a limited loss of life, but he would not allow political bombardment of a non-military place, and would limit the size of bombs.

On the question of espionage, which the draft Air Warfare Rules treat as liable to the ordinary laws of war for persons in aircraft or after leaving aircraft, the author regards the extreme penalty as obsolete; and he regards the legitimacy of disseminating political propaganda by aircraft as established by the practice in the war in spite of some early attempts to treat it as a capital offence. The draft rules confirm this.

The right of combatant action by military aircraft against enemy forces seems to lead to the ordinary consequences under the general rules of war by land, e. g. as against ground troops, that they can take a surrender of them, and as against enemy populations that they can " occupy effectively " their territory and exercise the right of requisitioning supplies from them, and such persons cannot then attack them or defend themselves against them except as part of the *levée en masse*, or even perhaps help their own airmen.

The author would assimilate the status of enemy civil aircraft to that of enemy vessels in sea warfare, as they can be made available for military purposes and should therefore be liable to sequestration or confiscation, and the draft Air Warfare Rules so provide. As regards neutral aircraft, no precedents were furnished by the war, as the belligerents prohibited all but military machines, and neutral states had not sufficiently developed aviation to make it necessary to take account of them, but the draft rules provide for their assimilation to neutral vessels as regards " visit and search," capture and liability to prize jurisdiction for breach of belligerent orders or the rules of war. The war did, however, produce precedents as to the entry of belligerent aircraft into neutral jurisdiction, and the status of the machines and their crews, their liability to or exemption from internment. The draft rules provide for the case of breaches of neutrality as regards neutral volunteers in a belligerent air service and the supply of aircraft or their fittings to a belligerent, as strictly as in the case of land and sea services; and the right of requisition applies to neutral aircraft found in occupied enemy territory and that of angary to those found in the belligerent's own jurisdiction. The similarity between aircraft and submarines (now, however, subject to the unratified Washington Convention), as novel instruments of warfare which cannot literally comply with the ordinary rules governing ships at sea, is illustrated by the question whether a belligerent military aircraft can direct a ship to deviate from her course for examination without actually boarding her; indeed the draftsmen of the Air Warfare Rules were not agreed, but the author agrees with the view of the United States representatives which would prohibit it.

The foregoing references may suffice to show the comprehensive character of Mr. Spaight's book, and the care with which he has discussed all aspects of the subject. The number of practical instances cited by him as illustrations adds enhanced interest to its perusal. There can hardly be disagreement with his practical and hopeful conclusion that air warfare will remain legitimate, but its scope should be moderated by the feelings of chivalry, by political considerations such as the fear of reprisal, and by agreement that its primary object should be destruction of property, not the taking of life. Subject to this, the right to

attack military objectives should be insisted on and continued. The book will be of the highest value to all who have to study and apply the rules of air warfare so as to reconcile the claims of humanity with the destruction of the forces of the enemy.

G. G. P.

The Geneva Protocol. By Professor P. J. Noel Baker. King & Son. 8vo. x+228 pp. (9*s.*)

The Covenant of the League of Nations was accepted by the peoples of the Empire blindly, on the faith of its authors and its aims. How little its provisions are understood even to-day may be seen from diatribes in the Press and elsewhere attacking the Geneva Protocol as a dangerous novelty on grounds often equally applicable to the Covenant. Professor Baker's book was intended to prevent the British people from rejecting, or accepting, the Protocol in a like cloud of ignorance. The fact that the Protocol has been killed by the present Government, as the Draft Treaty of Mutual Assistance was killed by its predecessor, hardly diminishes the interest or importance of the book. For though the Protocol is hardly likely to revive in its present shape, it may well be that its lines are those along which the wisdom of the future will work when the sense of international solidarity is firmer, when Germany and perhaps other great nations have joined the League, and the flaming hostilities of Europe have subsided.

Professor Baker is peculiarly qualified for his task, both as an international lawyer and as one who possesses an intimate first-hand knowledge of the various negotiations conducted since 1919 with a view to promoting disarmament and security. He can explain not only what the makers of the Protocol said, but why they said it. At the same time he distinguishes sharply between the text of the Protocol and the glosses of the Benes-Politis report, which he finds frequent occasion to criticize.

A second reading of the book leaves the present reviewer with an increased admiration of the writer's thoroughness in the exploration of detail, his resourcefulness in argument, his fairness in stating, and courage in tackling, the case of the opposition, and above all his invincible determination that his cause shall, and will, prevail. Some may feel that Professor Baker has the defects of his constructive qualities, and that despite himself his book is stronger on the side of advocacy than of criticism.

The author takes the view that the Covenant of the League was a "work of genius" and has been in practice "a strong and satisfactory instrument in justiciable and non-justiciable disputes," but that experience has proved that, if progress is to be made in the reduction of armaments, the "right of war" must be more narrowly restricted. "The Protocol, if it were to be successful, *had* to go further than the Covenant had gone." The most important change made by it he takes to be the provision for the compulsory jurisdiction of the Permanent Court in justiciable disputes,—a provision which might well be rescued from the shipwreck of the Protocol. Next in importance he places the provision for compulsory arbitration in the last resort as the alternative to the ultimate right of war retained in the Covenant. His defence of compulsory arbitration is manful, though, in view of his admission

that it might prove dangerous and is in practice likely to be little used, one may ask whether it was worth the candle of controversy it was certain to light. Seeing, too, that arbitrators are bound to act " on the basis of respect for law " and obviously cannot alter the law of treaties, there is something in the argument that the Protocol tends to " stereotype the status quo." Professor Baker would reply to the first objection that nothing would make France feel safe but the promise that in *every* case of war she should enjoy the support of other nations, and that, therefore, the " right of private war " had to be abolished ; to the second, that the territorial status quo is already guaranteed by Article 10 of the Covenant, subject to conceivable modification under Article 19, with which the Protocol does not interfere. And he uses a telling quotation from Count Apponyi to show that important opinion even in ex-enemy countries rejects the idea of altering frontiers by violence. He is particularly good in laying bare the misconceptions connected with the notorious " Japanese amendments," which do not at all restrict the domestic jurisdiction of states ; he believes that the Protocol would actually work in the interests of the British Commonwealth in this case as in others.

In Chapters VI and VII, dealing with Articles 7–10 of the Protocol, Professor Baker seems to underrate the difficulties of nipping incipient war in the bud, and his picture of League of Nations officials " disengaging " armed forces in contact, like umpires on a field-day, is not convincing. Nor is it clear how the Protocol would help us in the case of a Japanese attack on Hong-Kong and Singapore. In the important matter of the determination of the aggressor, after pointing out that willingness to accept arbitration is not by itself a certain test, he argues at some length against the value of the " arbitral presumptions " of Article 10 and in favour of that of the " military presumptions." Surely both are important, since the test of aggression is not " resort to war," as Professor Baker states, but " resort to war in violation of the articles contained in the Covenant or in the present Protocol." The omission to explain the " Japanese " proviso with regard to the arbitral presumptions would seem another flaw in this section.

Generally speaking, such weaknesses as are apparent in this admirable book lie, not in the writer's exposition of the Protocol, but in his defence of it ; there is a tendency to put too great trust in promises depending for their fulfilment on future political decisions, and to over-estimate the pacific force of public opinion. Juries have a way of returning illogical verdicts when they feel that it was " not in human nature " to observe the law, and the tribunal of public opinion might make it impossible for governments to act up to their legal obligations in certain cases. Nor does Professor Baker, in our judgment, give sufficient weight to the argument that in the present inchoate and incomplete condition of the League, with a large section of non-continental opinion distrustful of " entanglements," it is inopportune to extend its obligations. But these are mere personal opinions, and Professor Baker's views deserve the fullest respect.

J. R. M. B.

International Law. By Professor Charles G. Fenwick. George Allen & Unwin, Ltd. xxxvii + 641 pp. (21*s.* net.)

The purpose of Mr. Fenwick's treatise on international law is set forth in his preface. A clear delimitation of the existing rules of international law, showing which of them have obtained general acceptance among nations and which are still only in the phase of gradually obtaining general acceptance, is the first step towards a better state of world affairs. This method will at least bring home to people how large a section there still remains of the field of international relations which international law makes no attempt to dominate, a lesson which Professor Brierly endeavoured to inculcate in the pages of the Year Book in his article on the " Shortcomings of International Law " in 1924.

Whatever its shortcomings and its limitations, international law is a large subject to comprise within the limitations of a single volume, and any author of such a volume is bound to steer a middle course between too great a citation of all the incidents and precedents which have occurred in the past, and too rigid a limitation of the text to formulating the principles which may be deduced. Professor Fenwick is very successful on this point. The examples which he gives are quite sufficient to make the reader see what actually happened in practice and how the competing interests of the states concerned came in conflict. History tends to repetition. Incidents which occurred in the past are the incidents which are likely to happen again in the future. It is to guard against dangerous developments arising from such incidents that rules are wanted to show which is the state whose interests are to give way. At the same time the reader who wants to see the wood and not only the trees will not be wearied with over enumeration of incidents. The references to other works on international law and to reports and digests will give the practitioner and the research student all the clues they need to more exhaustive study of the subject.

Whether the arrangement of the subject-matter which Professor Fenwick adopts is the best and most logical is another matter. We are far from knowing yet what is the perfect plan. It is not likely that at present any two international lawyers would agree on the subject. The basis of Professor Fenwick's arrangement is that of enumerating rights ; the rights which a state as a state enjoys, the rights of existence, of independence and so on, and the consequential results of those rights, such as jurisdiction over persons, territory, ships, &c., leading on to the remedial rights, the right to enforce the substantive rights and the methods by which the remedial right can be enforced. International law to Professor Fenwick consists of my rights, your duties. Is this true ? If it is true, is it the path of progress for international law ? There seems to be far too little stress laid on the *duties* of a state as a state, and it is a question whether much that seems unsatisfactory and abnormal in world conditions to-day would not fall into better perspective if looked at from the aspect of state duties instead of state rights. The duties of a state are not limited to respect for the rights of other states. Take as an example a question such as a régime of capitulations. If attention is concentrated on the rights of a state, its rights to jurisdiction and to equality with all other states, any system of extra-territorial jurisdiction within its territory for the benefit of the nationals of another Power is indefensible, but if the problem is considered from the point of view of state duties, from that of the obligation of a state to

maintain within its borders a judicial system which shall afford an honest and effective administration of justice to all persons, whether citizens or aliens, the maintenance of a system of capitulations ceases to be unjust and unreasonable so long as that state's obligation is not fulfilled. The essence of international progress is good government within the individual states, and there can be no good government within the limits of individual states unless every branch of the administration reaches a high level. If states are to lay stress on external recognition of their rights, it should be accompanied by rigid attention to good administration internally. This may seem to be a matter of political philosophy rather than of international law, but it is the backward and the recalcitrant states which really constitute the hindrance to the progress of international law. How much easier would it be to institute that international machinery for enforcing international rights, of which Professor Fenwick frequently deplores the absence, if states were equal, not only in theory, but also in the level of good administration maintained within their territories. International lawyers can help materially in the progress of the world if they will inculcate the doctrine that the extent to which a state can expect to achieve recognition of its rights depends on the extent to which and the success with which it fulfils the purposes for which states exist.

These reflections imply no criticism of Professor Fenwick. He has followed the general method of the publicists. They are prompted only by the feeling that the path of progress would be clearer if another plan had been adopted.

In one respect Professor Fenwick breaks away from the normal arrangement followed by the writers of treatises. The departure is interesting. He relegates war and the law of war to a lower plane than the law relating to the normal intercourse of states. To him war is merely a recognized method of enforcing the rights which a state is admitted to possess. War is therefore merely an international procedure for the protection of rights. Instinctively one feels that this is correct, that a sharp division of international law into the law of peace and the law of war elevates war to a position which it is not entitled to occupy, and that the method adopted in the book is sounder. Procedures for the protection of rights fall into three groups: peaceful procedure, forcible procedure not amounting to war, and war. Peace is the normal relation between two states. War comes but seldom. It should come never. The circumstance that when it does come it absorbs the whole energy and life of a nation and brings its Government and its people into sharp conflict with other states with which it remains at peace is no ground for obscuring the fact that it is the law of peace to which international lawyers should devote their attention. It is in the imperfections of the law of peace that the seeds of war are sown.

Detailed criticisms might easily be made. Of what treatise of six hundred pages might this not be said? International law is not an exact science, and many comments would be made by one lawyer with which another would not agree. Here and there arguments are used which do not strike one as sound, or explanations given which seem inadequate; they are but details. The work as a whole attains a high level and should be valuable to students. As regards the chapters dealing with the practices of belligerents, Professor Fenwick admits frankly (see Chapter XXVI) that changes of circumstances as regards war have rendered much obsolete that was assumed to be settled law. The Great War has taught us that many of the rules laid down so clearly by the Stowells and the

Marshalls of the past may have to be re-examined in the light of the basic principles on which they rest. A compromise between the belligerent interest of preventing the enemy from trading and the neutral interest of maintaining commercial relations with a friendly state, which was just and fair at the beginning of the nineteenth century, may not be so when railways, steamers, and telegraphs have revolutionized the methods of commercial intercourse. The position in the Great War became confused through the introduction of measures based on retaliation. Study and investigation of an intensive kind are required before lawyers will agree as to the belligerent measures at sea which are legitimate and before Governments will agree with their conclusions.

If the view is accepted that law is only an international procedure for the enforcement of rights, imperfections in the statement of the law of war seem much less important than imperfections in the statement of the substantive rights and duties of states, and in this latter part of Professor Fenwick's work the level is distinctly high. It varies a little here and there. The part of Chapter VII dealing with the recognition of new states and governments is more satisfying than the part relating to state succession. Insufficient account seems to be taken of the Barcelona Conventions as to the recognition of the flag of non-maritime states and as to transit and waterways of international concern. On p. 324 the author seems to have forgotten that other states may make international agreements which become binding on signature, whatever may be the difficulties imposed by her constitution on the United States. The section on pacific blockade will meet with criticism in quarters where it is held that whatever may have been the intention of the blockading state, pacific blockade constitutes an act of coercion which the other state is entitled to treat as an act of war.

One last comment should certainly be made. Not only is the type in which the book is printed clear and good and the paper light, but it is issued at a moderate price. In these days of high prices this is a circumstance for which all who are interested in international law should be grateful. Books whose price relegates them to the category of museum specimens will not augment the general interest in the science.

Both Professor Fenwick and his publishers are to be congratulated.

C.

Wörterbuch des Völkerrechts und der Diplomatie, begonnen von Prof. Dr. Julius Hatschek, fortgesetzt und herausgegeben von Dr. Karl Strupp. Berlin: Walter de Gruyter & Co.

The twelfth and thirteenth parts of this important work completing the second volume have now appeared, and the hope and intention of the Editor to confine the subject within the limits of two volumes has not been realized. The present portion ends with the letter U, the third and final volume will deal with the remaining letters and contain a complete index.

Though the articles in the numbers are of varying degrees of value, yet, on the whole, a high standard is maintained, and every international lawyer will derive assistance in every department of his studies from this new Dictionary of International Law and Diplomacy.

The Conduct of Foreign Relations under Modern Democratic Conditions. By De Witt Poole. Oxford University Press. 208 pp. (10*s.* 6*d.*)

This is a useful book. It does not profess to be an exhaustive analysis of the philosophy of the control of foreign policies in modern democracies, but it strives to set people thinking by explaining the elements of the problem, by making them realize its factors. These factors may seem almost obvious when pointed out, but nevertheless they want pointing out. If this is not done, they are forgotten or taken for granted.

The volume consists of a reprint of a series of papers contributed to a round-table discussion at the Institute of Politics at Williamstown, Massachusetts. The first part gives a description of the organs existing in the democratic countries of western Europe and in the United States for the conduct of foreign affairs, and of such international organizations as have come into being. It also summarizes the necessary consequences of the independence which every sovereign state is recognized as possessing, such as the unanimity which must prevail at conferences, the freedom from external control which all states enjoy whether great or small, consequences which would render international relations almost impossible but for the powerful incentives towards co-operation and agreement which self-interest affords through the advantages derived from untroubled relations with other Powers. Less obvious, but equally important to remember, are the limitations imposed on every foreign minister by constitutional checks or military weakness.

The second part deals with the means by which the people of a country can, and in the end do, bring the weight of their opinion to bear upon the control of foreign affairs.

For a sound public opinion to exist in any country on external questions three conditions must be fulfilled. There must, firstly, be a sustained public interest in them. At present public interest is too fitful and spasmodic. Humanity tends to take an interest only in matters which touch it closely, and domestic questions are apt to loom more largely on the horizon than external. It is only when such questions touch the prosperity or the security of a country that public interest is aroused. Secondly, the public must be informed, and thirdly, the public must understand. It must be able to reach conclusions by rational processes. If sentiment and prejudice are to be allowed in any country to dominate the public view on matters of foreign policy, public opinion will only tend to embarrass, not to help, the minister in charge of foreign relations.

Starting from the above premisses, the author works through the methods by which public opinion tends to crystallize and then to impose itself upon the executive branches of the Government through the legislature, through the press and through other means, such as contested elections or direct consultation of the people by a referendum, and reaches the conclusion that in the great democracies of the west effective methods already exist for ensuring the popular control of foreign affairs. It is in the small use which is made of those methods that the explanation is to be found of a seeming lack of popular control over foreign affairs. A well-informed and comprehending public will always get its way in external affairs just as in domestic questions, but democracies tend to be inefficient in the control of foreign affairs.

C.

La Théorie générale des Mandats internationaux. By J. Stoyanovsky. Les Presses Universitaires de France. 8vo. 251 pp. (15 francs.)

M. Stoyanovsky has not only written the best book that has yet appeared concerning the system of international colonial mandates established under the authority of the League of Nations in virtue of Article 22 of the Covenant ; he has also done a most useful piece of work which badly needed to be done. His purpose is to discuss the general theory of the mandates with particular reference to their legal character. He does so with economy of expression, lucidity of thought and with confident assurance in a sphere of legal theory as complicated as it is controversial. In addition his book is well arranged and readable.

Apart from the earlier sections which deal with the origins of the Mandate system, M. Stoyanovsky keeps closely to the legal theory of the system as a whole and to the legal interpretation of the various provisions of the mandates. In this he has certainly done rightly, for it is early days as yet to discuss their application—though he aptly illustrates his arguments with some concrete cases that have already arisen—while on the other hand a clarification of legal conceptions on the whole subject is much required. His account of the origins of the system is interesting and acute, though it is not quite complete, for the reason that some of the relevant documents have never been published. For the same reason his discussion of the legal title of the Mandatory Powers, while valuable, is also incomplete. He does not bring out the fact that paragraph 8 of Article 22 of the Covenant was drafted in February, 1919, in the expectation that the terms of the mandates would be drawn up by the Peace Conference itself and inserted in the Peace Treaties as part of the colonial settlement. This was the real meaning of the words which occur in that paragraph : " if not *previously agreed upon* by the High Contracting Parties." Likewise, his argument concerning the necessity of withdrawing a mandate from a Mandatory Power, should it cease its membership of the League of Nations, while interesting, does not seem in itself quite conclusive.

On the other hand, his discussion of the position of the British Dominions which are Mandatories of the League is adequate and suggestive ; and the best chapter in his book is that which is devoted to the very difficult question of sovereignty. He rightly regards this as being the most important part of his subject, for, as he says, " c'est de la solution qu'on lui donne que dépend le système lui-même." The discussions of the Permanent Mandates Commission concerning the nationality of the inhabitants of mandated areas, concerning loans to be made for public works in such areas, and on other subjects, have already shown the truth of this contention.

After a full discussion of various doctrines, M. Stoyanovsky arrives at the conclusion that " la souveraineté sur les territoires soumis à mandat réside dans les peuples de ces territoires. L'exercice des attributs de la souveraineté est provisoirement confié à une puissance agissant en qualité de tuteur de ces peuples mineurs." For this conclusion he makes a very strong case indeed, which is supported by much of his subsequent argument. Not every one, of course, will agree with the whole of the grounds upon which he rests it ; there are even those (vide British Year Book for 1924) who would dispute his unargued assumption that the League of Nations " n'est pas une personne de droit international."

It may be hoped that M. Stoyanovsky will continue to give his attention to the subject of mandates and will publish a new edition of his book, revised in the light of current practice, in a few years' time.

P. J. Noel Baker.

Immunity of State Ships. By Dr. N. Matsunami. Richard Flint & Co. xv + 208 pp. (10*s.* 6*d.*)

This book deals with a subject which was of comparatively minor practical importance at the date of the decision in the " Parlement Belge," but has become of great importance of recent years, owing both to the large number of ships which were under Government requisition during the war and to the increased tendency since the war for states to own vessels and employ them in purely mercantile operations. The result has been that rules of law which were laid down at the time when the category of " State ships " was practically confined to warships and other vessels which might be described as " public vessels " in the strictest sense of the term are now applied to vessels which, apart from their ownership or control, are indistinguishable from ordinary trading vessels. The doctrine of immunity from process, when applied to vessels of the latter category, has naturally produced considerable hardship. It is therefore not surprising that a movement for the modification of the rules in question has begun, and a well-informed book on the subject is extremely welcome.

Professor Matsunami is particularly well qualified for the task which he has undertaken. His attention has been directed to the subject ever since the collision between the Japanese cruiser *Chishima* and the Peninsular and Orient steamer *Ravenna* in 1892. At the meeting of the International Maritime Law Conference in London in 1899, he proposed a resolution in favour of the payment of damages " according to the general principle of the Maritime Law " in cases of collision between a warship and a merchant vessel. In 1900 he published his " Collision between Warships and Merchant Vessels," and at the Paris Conference in the same year he brought forward the same resolution. More than twenty years later his perseverance was rewarded, when the Conferences of the International Maritime Committee held at London and Gothenburg passed resolutions in favour of the abolition of the immunity of State-owned ships.

After a preliminary discussion of the meaning of the words " State," " State ship " and " immunity," Professor Matsunami gives a description of the present state of the law in the principal maritime countries. The account of English law on the subject is extremely full and accurate, although the author seems to go astray where he says that there seems to be no authority extending to aliens the privilege of presenting a petition of right ; there are certainly cases, e. g. *Rederiaktiebolaget Amphitrite* v. *The King* (1921), 3 K. B. 500, where a petition of right has been brought by an alien without objection being taken on behalf of the Crown. A very clear account is given of the means by which, notwithstanding the doctrine of the immunity of the Crown from process, a remedy is in fact given in cases where an individual has suffered damage by the act of the Crown's servants. It is interesting to note the effect on an intelligent foreign observer of the difference between theory and practice in English law. In theory there is no remedy against the Crown ; in practice a remedy exists in the English courts in every case where a claim has arisen in connexion with the proceedings

of a British public ship. But Dr. Matsunami, while he fully realizes what the practical position is, is much impressed by the fact that the theoretical disability still continues, and hopes " that the question of immunity of state ships will be solved before long in favour of the public at large."

The account of the law in other maritime countries is less satisfactory. In the case of Germany, for instance, there is really no statement as to what the position under German law is ; and the account of the position in the United States, where the question is of particular importance, owing to the operations of the Emergency Fleet Corporation and the Shipping Board, is inadequate.

In the concluding chapters the author states his own views as to the changes which should be introduced. He would abolish the immunity of state ships from process in all cases. He would apply the same rules as to limitation of liability as are applicable to private shipowners. He would not, however, make state ships liable to arrest, since he considers that to do so would be contrary to public policy and that the right to arrest is not necessary to ensure the satisfaction of individual claims against the state. For the same reason he does not think it necessary that bail should be given. He considers that the jurisdiction over state ships should only be exercised by their own national courts.

Professor Matsunami's proposals seem both practical and reasonable. The present situation is anomalous and causes serious hardship. Even in England, although there is in practice a remedy against English public ships, there is none if the ship is owned by a foreign state, and it has already been suggested from the English Bench that, if in such cases claims for salvage are resisted by the foreign state and immunity claimed in the English courts, the result will be that state-owned ships which may happen to strand will be left on the mud. The matter is, however, one which can only be effectively dealt with by international action, and it might well engage the attention of some committee of the League of Nations.

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[1] Published by A. W. Sijthoff's Publishing Co., Leiden, The Netherlands.

[2] March 1—Nov. 30, 1924. Published by H.M. Stationery Office, Kingsway, London, W.C. 2. The figures in parenthesis indicate the price including postage.

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—— See also *Reparation.*

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Germany. See *Reparation.*

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—— See also *Jubaland.*

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Norway. See *Spitsbergen.*

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—— See also *France, Italy.*

Switzerland. See *Liechtenstein.*

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—— Correspondence between H. M. Government and the Government of the United States of America respecting the Appointment of an Irish Free State Minister Plenipotentiary at Washington. (*United States No.* 2, 1924.) [*Cmd.* 2202.] 2*d.* (2½*d.*).

SUMMARY OF EVENTS[1]

May 1, 1924—February 28, 1925.

(Together with dates of earlier events not previously noted.)

COMPILED BY THE BRITISH INSTITUTE OF INTERNATIONAL AFFAIRS.

Abbreviations.

A. J. I. L., *American Journal of International Law*. *Cmd.*, Great Britain, Parliamentary Papers. *E. N.*, *L'Europe Nouvelle*. *F. F.*, *Feuille Fédérale* (Swiss). *J. O.*, *Journal Officiel* (French). *L. N. M. S.*, *League of Nations Monthly Summary*. *L. N. O. J.*, *League of Nations Official Journal*. *L. N. T. S.*, *League of Nations Treaty Series*. *T.*, *The Times* (London).

Albania.

1923. April 6. Serb-Croat-Slovene Government asked Conference of Ambassadors for revision of the decision of the Conference of Dec. 6, 1922, by which it assigned the Monastery of St. Naoum to Albania, on the ground that the monastery had been attributed to Serbia by the Conference of Ambassadors at London in 1913, and that she therefore had a vested right to it.

1924. June 4. Conference of Ambassadors referred question to League of Nations Council. June 17, Council decided to ask Permanent Court of International Justice for an advisory opinion. Sept. 4, Permanent Court gave advisory opinion upholding decision of Conference of Ambassadors of Dec. 6, 1922.

Oct. 31. Fourteen villages awarded to Albania by decision of Conference of Ambassadors of Nov. 9, 1921, evacuated by Greek administration.

Dec. 12 or 13. Insurrection broke out in Albania. Dec. 18, Albanian Government appealed to League of Nations asserting that insurrection had been organized in Jugoslav territory and asking League to bring matter to attention of Jugoslav Government. Dec. 20, Albanian Government asked that question be submitted to League Council. Dec. 21, Italian and Jugoslav Governments agreed on policy of non-intervention in Albania. Dec. 24, Ahmed Bey Zogu, leader of insurgents, occupied Tirana ; note from Jugoslav Government to League of Nations refuting Albanian charges.

1925. Jan. 31. Albanian Constituent Assembly adopted Republican form of government and elected Ahmed Bey Zogu, President.

Argentine.

1924. May 24. Ratifications exchanged of arbitration treaty with Venezuela of July 22, 1911.

Nov. 4. Diplomatic relations with Vatican suspended.

Nov. 17. Arbitration treaty concluded with Switzerland at Buenos Aires. (*F. F.*, 11.2.25.)

Austria.

1923. June 26. Agreement concluded with Serb-Croat-Slovene Kingdom concerning execution of Articles 93, 191 bis and 196 of the Treaty of St. Germain of Sept. 10, 1919. Ratifications exchanged, Nov. 29, 1923.

June 29. Protocol signed at Innsbrück by Succession States of old Austro-Hungarian Empire concerning division of pre-war debts.

July 16. Agreement concluded with Italy at Vienna concerning transfer of domicile of societies, &c. Ratified by Austria, Dec. 21, 1923.

Nov. 22. Six conventions regarding frontiers signed by Austro-Jugoslav Delimitation Commission.

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[1] The information given has been collected from newspapers and other sources, and it has not been possible in every case to test its accuracy. References in brackets indicate where texts are to be found.

1924. March 29. Convention with Belgium signed at Vienna in execution of Article 15 of the convention of Oct. 4, 1920, regarding application of Section III of Part X of Treaty of St. Germain of Sept. 10, 1919. (*Moniteur Belge*, May 23, 1924.)
March 29. Ratifications exchanged of Austro-Bulgarian convention of Oct. 20, 1922, maintaining in force the judicial assistance and extradition convention between the old Austro-Hungarian monarchy and Bulgaria of May 31, 1911.
June 16. Agreement concluded with Italy for surrender of Austrian Legation in Constantinople to Italy.
Aug. 19. Protocols regarding adjustment of Austro-Hungarian frontier signed by Delimitation Commission at Budapest.
Oct. 11. Arbitration convention concluded with Switzerland at Vienna.
Nov. 26. Agreement concluded between Austria, Hungary and the United States for the establishment of a Claims Commission.

Baltic States.

1924. Feb. 16–18. Meeting at Warsaw of representatives of Finland, Esthonia, Latvia, and Poland. Discussion covered economic relations, joint action at next Assembly of League of Nations and conclusion of an arbitration convention.
Nov. 24–Dec. 4. Conference of Baltic States, Germany, Poland, and Soviet Russia held at Helsingfors to consider measures for suppression of liquor smuggling. Protocol signed.
1925. Jan. 16–17. Representatives of Finland, Esthonia, Latvia, Lithuania, and Poland met at Helsingfors. Agreements concluded concerning arbitration, communication facilities and passport formalities.

Belgium.

1923. May 26. Convention concluded with Hungary concerning execution of Art. 231 of Treaty of Trianon.
1924. July 24. Agreement concluded with Italy by exchange of notes of June 25 and July 24 regarding sequestration of German goods.
Sept. 15. Ratifications exchanged at Aix-la-Chapelle of convention with Germany of Sept. 11, 1922, regarding option.

Brazil.

1924. June 23. General arbitration treaty concluded with Switzerland. (*F. F.*, 5.11.24.)

Bulgaria.

1924. April 4. Ratifications exchanged of naturalization agreement with United States of Nov. 23, 1923.

Canada.

1924. Jan. 8. Ratifications exchanged in London of commercial agreement with Italy of Jan. 4, 1923.
June 6. Smuggling agreement concluded with United States at Ottawa.
July 11. Customs agreement concluded with Netherlands on most-favoured-nation basis.
Sept. 6. Commercial treaty concluded with Netherlands on most-favoured-nation basis.
Oct. 21. Ratifications exchanged between Canada and the United States of halibut agreement of March 2, 1923. Feb. 1925, treaty presented by Canadian Government for registration with League of Nations Secretariat.
1925. Feb. 24. Treaty signed with United States providing for more accurate definition of the frontier between the two countries ; also convention regarding regulation of level of Lake of the Woods.

China.

1924. Jan. 13. New cabinet formed with Sun Pao-chi as Prime Minister.
April 28. Foreign warships withdrawn from Canton.
May 3. Note from American Minister at Pekin to Chinese Foreign Minister requesting China to take note of her responsibility under 13th resolution of Washington Conference as trustee for Chinese Eastern Railway. June 16, Chinese note to United States, Japan, and France stated that since conclusion of Sino-Russian agreements (of May 31, 1924), the two governments of China and Russia would deal with the question of the railway, with which they only were concerned.

May 21. United States President approved resolution for remission of Boxer Indemnity. Notes on the subject exchanged between United States and Chinese Governments, June 14.

June 6. Agreement concluded with Germany by exchange of notes regarding German-Asiatic Bank. June 7, agreement concluded by exchange of notes for settlement of indemnity questions, questions relating to sequestration of German goods in China and other outstanding points.

Civil War, Aug. 11. Joint note from Powers to Chinese Government regarding protection of foreign lives and property at Shanghai in event of hostilities. Sept. 3, Fighting between Kiangsu and Chekiang forces began near Shanghai. Sept. 5, Lu Yung-Hsiang of Chekiang declared war on President Tsao Kun. Sept. 7, Chang-Tso-lin declared war on Tsao Kun and Wu Pei-fu. Oct. 23, General Feng Yu-siang deserted Wu Pei-fu, returned to Pekin and demanded abdication of Tsao Kun and proclamation of peace. Oct. 24, Tsao Kun issued mandate ordering immediate cessation of hostilities and dismissal of Wu Pei-fu from command of forces. Oct. 25, President resigned. Oct. 31, Provisional Ministry appointed with Huang-Fu as acting Premier. Nov. 3, Wu Pei-fu left Pekin. Nov. 5, Provisional Government troops invaded Imperial Palace and forced Manchu Emperor to sign revised form of abdication agreement under which he agreed to the abolition of his titles, the reduction of his subsidies, and his retirement from the Palace. Nov. 24, Tuan Chi-jui assumed office as President. Nov. 27, New cabinet completed. Dec. 2, Chang Tso-lin left Pekin for Tientsin. Dec. 4, Sun Yat-sen arrived at Tientsin. Dec. 9, Powers signatory to Washington Agreements informed Provisional Government that they would support it on certain conditions, among them that Government would undertake to respect treaties contracted by previous Chinese Governments. Dec. 24, Provisional Government gave formal assurance to Powers that treaties would be recognized. 1925. Jan. 2, Mandate issued in Pekin granting amnesty to all political offenders except Tsao Kun. Jan. 27, Note from Powers to Provisional Government laying stress on Government's responsibility for protection of foreign lives and property during the renewed conflict round Shanghai. Feb. 5, Chen Chiung-ming attacked Canton.

1925. Feb. 21. Chinese Government paid £300,000 in settlement of demands for damages in connexion with Lincheng bandit outrage in May 1923, with exception of supplementary claims.

Costa Rica.

1924. Nov. 24. Costa Rica ratified general treaty of peace and amity and eleven conventions signed at Central American Conference held at Washington from Dec. 4, 1922, to Feb. 7, 1923.

Czecho-Slovakia.

1924. March 1. Ratifications exchanged with Italy of agreement of Dec. 21, 1922, concerning Port of Trieste, and of commercial and navigation, juridical and financial conventions of March 23, 1921. Supplementary commercial agreement, consular convention and convention concerning double taxation concluded. Ratifications of supplementary commercial agreement exchanged Oct. 27, 1924.

March 16. First elections for National Assembly held in Carpathian Ruthenia.

March 26. Conference of Ambassadors decided to ask Polish-Czecho-Slovak Delimitation Commission to have prepared protocols safeguarding the economic and transit interests of the communes in the neighbourhood of the frontier in the Javorzina district. April 26, Delimitation Commission met at Cracow. May 6, Protocol drawn up at Cracow under which the Czecho-Slovak and Polish Governments proposed adjustment of economic questions relating to Javorzina and decided that frontier in that district should be defined by a Czecho-Slovak-Polish Delimitation Commission. Sept. 5, Protocol approved by Conference of Ambassadors.

April. Agreement concluded with France concerning restitution of machines transported into France during the war.

May 1. Convention regarding archives signed by Succession States of Austria-Hungary on April 6, 1922, ratified by Czecho-Slovakia.

July 5. Pact of cordial collaboration with Italy signed. Ratifications exchanged August 21, 1924. (*L. N. T. S.* XXVI.)

Oct. 15. Protocol with Hungary regarding frontier relations signed at Budapest.

Nov. 11. Extradition treaty and convention respecting civil procedure concluded with Great Britain in London.

Danube.

1924. June 30. Serb-Croat-Slovene Kingdom deposited ratification of convention approving arrangements regarding the permanent Technical Commission on the Danube signed in Paris on May 27, 1923, by Austria, Czecho-Slovakia, Hungary, Rumania, and Serb-Croat-Slovene Kingdom.

Danzig.

1923. May 3. Convention signed on behalf of the British Empire, France, Italy, and Japan relating to cession of German public property in Danzig and transfer of part of the property to the Harbour Board of the Free City. (*Cmd.* 2204.)

1924. Jan. 23. Agreement concluded with Poland concerning group of Polish banks forming part of consortium for creation of Danzig Bank.

Feb. 14. Agreement concluded with Poland concerning the *cautio judicatum solvi*.

March 17. Two agreements concluded with Poland at Danzig concerning judicial assistance with regard to taxation and avoidance of double taxation.

May 14. Agreements concluded with Poland at Danzig regarding the accession to Berne railway convention, passports, position of Danzig with regard to commercial treaties, right of Port and Harbour Board to contract loans, and sale of immovable property.

June 7. Agreement concluded with Poland for opening of negotiations for settlement of railway disputes and four cases concerning protection of interests in Poland of Danzig nationals and organizations which had been referred to League of Nations. (*L. N. O. J.*, Aug. 1924.)

Denmark.

1924. Jan. 28. Danish and Norwegian representatives agreed at Christiania to recommend to their Governments the conclusion of a convention relating to East Greenland. Treaty regarding hunting and fishing rights signed July 9, 1924; came into force July 10, 1924. (*L. N. T. S.* XXVII.)

May 29. Liquor treaty with United States concluded at Washington. Ratifications exchanged, July 25, 1924. (*L. N. T. S.* XXVII.)

June 6. Arbitration treaty concluded with Switzerland. (*F. F.*, 5.11.24.)

June 24. Arbitration treaty concluded with United States in Washington.

June 27. Arbitration treaty concluded with Sweden.

Dominican Republic.

1924. June 12. Agreement concluded with United States regarding evacuation of American troops. July 12, Troops withdrawn, and American military administration came to an end.

Sept. 25. Commercial agreement on most-favoured-nation basis concluded with United States.

Sept. 29. Admitted to membership in League of Nations.

Ecuador.

1924. June 21. Protocol signed at Quito providing for submission to arbitration of boundary dispute between Ecuador and Peru.

Egypt.

1923. April 14. Agreement concluded with Italy at Cairo regarding nationality of Libyans resident in Egypt. Ratifications exchanged, Dec. 29, 1923.

1924. March 15. King Fuad inaugurated new Parliament consisting of Senate and House of Deputies, granted to Egypt under constitution signed on April 19, 1923.

June 24. Anti-British demonstrations at Khartum and Omdurman; June 25, riot at Khartum. June 25, Announcement by Lord Parmoor in House of Lords that British Government did not intend to abandon Sudan. Aug. 9, Armed demonstration by cadets at Khartum Military School. Aug. 9–11, Rioting by soldiers of Egyptian railway battalion at Atbara and Port Sudan. Aug. 15, Communiqué issued by Egyptian Government stating that they would protest to British Government against its proceedings in the Sudan and insist on formation of an Egyptian-Sudanese Commission to examine conditions. British note handed to Egyptian Government intimating that Great Britain considered herself responsible for maintenance of order in the Sudan. Aug. 16, Egyptian note protesting against recent British action in Egypt and Sudan presented to British Government. Aug. 23, Egyptian reply to British note of Aug. 15 presented. Aug. 29, Further British note presented to Egyptian Government.

Nov. 19. Sir Lee Stack, Governor-General of Sudan and Sirdar, shot in Cairo; died of wounds Nov. 20. Nov. 22, British note presented to Egyptian Government, demanding apology, thorough inquiry into crime, prohibition of political demonstrations, payment of £500,000, immediate withdrawal from Sudan of all Egyptian officers and units of Egyptian army, increase of area to be irrigated in the Sudan and withdrawal of all opposition to British Government concerning protection of foreign interests in Egypt (*T.*, 24.11.24). Nov. 23, Egyptian reply presented accepting first four demands, rejecting the two conditions regarding the Sudan and giving evasive answer with regard to protection of foreigners; Egyptian Government then informed by Lord Allenby that the Sudan Government was being instructed to enforce the two conditions relating to the Sudan. Nov. 24, Egyptian Government paid fine of £500,000 but again protested against demands regarding the Sudan and protection of foreign interests; Lord Allenby informed Egyptian Government of seizure of Alexandrian customs offices owing to non-acceptance of conditions respecting protection of foreign interests; Zaghlul Pasha resigned office as Prime Minister; Ahmed Pasha Ziwar formed new Cabinet; protest and appeal for intervention by League of Nations, addressed by Egyptian Chamber of Deputies to League of Nations and all governments of the world, despatched to Geneva (*T.*, 27.11.24). Nov. 27, Mutiny of Sudanese troops at Khartum. Nov. 30, British conditions regarding protection of foreigners accepted by Egyptian Government. Dec. 2, British guard withdrawn from Alexandria customs house.

Esthonia.

1924. Jan. 10. Agreement concluded with Latvia concerning inhabitants of frontier districts crossing the frontier.

April 2. Agreement concluded with Latvia at Riga concerning common use of frontier roads.

Aug. Nine agreements concluded with Latvia and Russia at Reval forming a railway convention on the basis of the Berne Railway Convention.

Dec. 1. Serious communist rising in Reval suppressed by troops.

Finland.

1924. April 28. Two conventions and final protocols signed with Norway concerning frontier between districts of Finmark and Petsamo and traffic on Pasvik River and Jakobs River.

May 30. Extradition treaty concluded with Great Britain. (*Cmd.* 2183.) Ratifications exchanged, Nov. 30, 1924.

June 27. Agreements providing for establishment of Conciliation Commissions concluded with (1) Norway, (2) Sweden, at Stockholm. Ratifications of (1) exchanged, Oct. 4, 1924; of (2), Sept. 13, 1924.

France.

1923. July 2. Provisional aerial navigation agreement concluded with Netherlands in Paris.

Dec. 27. Agreement concluded with Great Britain by exchange of notes of Dec. 17 and 27, for extension to French zone of Morocco of provisions of Anglo-French Agreement of Oct.-Nov., 1899, regarding consular visas for certificates of origin. (*Cmd.* 2054.)

1924. Jan. 10. Protocol with Great Britain signed in London defining frontiers of Wadai and Darfur (E. Central Africa). Confirmatory declaration signed Jan. 21. (*L.N.T.S.* XXVIII.)

Jan. 22. Convention concluded with Tunis at Paris concerning war profits.

Jan. 23. French note to Switzerland urging resumption of diplomatic negotiations on Savoy Free Zones question and containing proposals for arbitration. Feb. 14, Swiss reply again suggested submission of matter to Permanent Court of Arbitration. March 20, French Government suggested submission of question to two jurisconsults, one French and one Swiss. March 31, Swiss Government accepted French proposal. Oct. 30, Agreement for arbitration signed at Paris.

Feb. 16. Arbitration agreement with Spain of Feb. 26, 1904, renewed for five years by exchange of notes of Feb. 11 and 16.

March 15–22. Exchange of notes with Russian Soviet Government regarding Bessarabian question.

March 23. Ratifications exchanged of agreement of July 19, 1923, with United States renewing Arbitration Treaty of Feb. 10, 1908.

March 24. Agreement concluded with Monaco in Paris concerning legalization of extracts from civil acts. (*J. O.*, March 31, 1924.)

April 4. Agreement signed in Paris extending to United States advantages granted under French Mandate in Syria to countries Members of the League of Nations (*A. J. I. L.*, Jan. 1925). Ratifications exchanged July 13, 1924.

May 15. Arrangement between France, the Saar, and Switzerland concerning telephonic correspondence between Switzerland and the Saar across France signed in Paris, March 10, Berne, May 5, Sarrebrück, May 15. Came into force June 1, 1924.

June 3. Ratifications exchanged of two conventions concluded with United States in Paris on Feb. 13, 1923, regarding Togoland and the Cameroons.

June 30. Liquor treaty concluded with United States at Washington.

July 28. Agreement concluded with Switzerland concerning fishing in Lake Leman and the Rhone.

1925. Feb. 14. Treaty of friendship, commerce and navigation with Siam signed in Paris ; with protocol on jurisdiction. (*E. N.*, 21.2.25.)

Germany.

1923. April 28. Agreement concluded with Union of Soviet Republics concerning commercial ships of one country in the hands of the other.

May 2. Agreement concluded with Poland at Dresden concerning prolongation of delay provided for in Art. 219 of convention of May 15, 1922, concerning Upper Silesia. Ratifications exchanged Oct. 25, 1923.

1924. Jan. 9. Herr Heinz, President of the Autonomous Government of the Palatine, shot dead in Speyer.

Jan. 9. German note to Inter-Allied Commission of Control in Berlin asking for cessation of permanent Inter-Allied military control. Feb. 27, British memorandum containing proposals concerning military control considered by Conference of Ambassadors and submitted for further consideration to Inter-Allied Military Committee. March 5, Conference of Ambassadors heard report of Marshal Foch, Chairman of Inter-Allied Military Committee and agreed on terms of note to Germany on basis of British proposals. March 6, Note from Conference of Ambassadors presented to Germany. (*Temps*, March 10, 1924) ; German reply, March 31. May 28, Further note from Conference of Ambassadors (*T.* 31.5.24). June 24, Joint British and French declaration handed to Germany (*T.* 25.6.24.) June 30, German reply to note of May 28 delivered accepting proposal for general inspection of German armaments. July 8, Reply from Conference of Ambassadors. July 31, Further German note. Aug. 15 ? Note from Mr. MacDonald to French Government. Sept. 8, Inspection of German armaments begun by Inter-Allied Military Commission of Control. Sept. 30, Inter-Allied Naval Control Commission dissolved on completion of its work. Nov. 5, Officers of Military Commission of Control assaulted at Ingolstadt. Dec. 18, Announcement by Lord Curzon in statement in House of Lords regarding evacuation of Cologne zone, that Final Report of Inter-Allied Military Commission of Control on German disarmament, on which Allied decision regarding evacuation must be taken, could not be received by Jan. 10. Dec. 22, British note to France suggesting that *status quo* in Cologne area be maintained till final report received from Military Commission of Control. Dec. 24, French Government replied that in their view interim reports already received from Military Commission proved the impossibility of evacuation of the Cologne zone by Jan. 10. Dec. 27, Conference of Ambassadors unanimously decided to declare evacuation of Cologne bridgehead on Jan. 10 to be impossible. Dec. 28, Belgian Government sent memorandum to Great Britain and France on evacuation. Dec. 31, Conference of Ambassadors addressed to Allied Governments text of note to be presented to Germany on postponement of evacuation. Jan. 5, 1925. Note presented to Germany by Allied Governments. (*T.*, 6.1.25.) Jan. 7, German reply. (*T.*, 8.1.25.) Jan. 26, Further Allied note presented to Germany. (*T.*, 27.1.25.) Jan. 27, German reply. (*T.*, 28.1.25.) Feb. 18, Final Report of Military Commission presented to Inter-Allied Military Committee. (*T.*, 18.2.25.)

Jan. 11. Agreement concluded with Poland at Katowice concerning modifications of Arts. 338–72 of convention of May 15, 1922, regarding Upper Silesia.

Jan. 12. Agreements concluded with Poland at Katowice concerning prolongation of Section IV, Chapter I, Part V of convention of May 15, 1922, and concerning common use of water-pipes in Upper Silesia.

1924. Feb. 2. German note to France concerning alleged support to Separatists in Palatinate. French reply Feb. 7.

Feb. 12. Serious fighting between about 30 Separatists and population of Pirmasens in Palatinate, resulting in practical extermination of Separatists. Serious trouble at Kaiserslauten Feb. 13.

Feb. 13 ? French note to Great Britain suggesting that solution of difficulties in Palatinate should be left to Inter-Allied Rhineland High Commission.

Feb. 18. Agreement reached between Bavarian Government and Central Government for renewal by Bavarian Division of Reichswehr of oath of allegiance to Reich. Herr von Kahr and General von Lossow resigned their offices as General State Commissioner of Bavaria and Commander of Bavarian Division of the Reichswehr respectively.

Feb. 20. German note to France on conditions in the Palatinate. Feb. 21, Note returned to German Ambassador in Paris on ground that France could not intervene in purely German quarrels.

Feb. 23. Agreements with Poland signed at Warsaw concerning (1) rights of railway officials, and (2) frontier zone in Upper Silesia. Ratifications of (2) exchanged July 16, 1924.

Feb. 26. Trial of General Ludendorff and Herr Hitler for treason begun at Munich. Trial concluded March 27. Judgment passed, April 1. General Ludendorff acquitted : Herr Hitler and other accused men given light sentences.

Feb. 28. Order issued suspending state of siege and substituting civil for military control, except in Bavaria.

Feb. 28. Provisional economic agreement on most-favoured-nation basis concluded with Siam in Berlin.

March 5. Agreements with Poland concerning tutelage and juridical relations in Upper Silesia, signed at Warsaw.

March 5. Commercial treaty with Nicaragua of Jan. 4, 1896, prolonged by exchange of notes.

March 12. Agreement signed with Poland at Warsaw concerning taking over of registers in Upper Silesia.

March 29. Concordat concluded at Munich between Bavaria and the Vatican.

April 30–May 7. Conference held in Vienna to decide interpretation of provisions of Polish Minorities Treaty of June 28, 1919, in regard to nationals in former German territory ceded to Poland. Agreement signed in Vienna, Sept. 3.

May 3. Premises of Soviet Trade Delegation in Berlin raided by German police ; office of delegation closed till further notice by Soviet Ambassador. May and June, Exchange of notes and conferences between Soviet and German Governments during which Soviet Government demanded recognition of extraterritoriality of Trade Delegation, and German Government protested against alleged infraction of German laws by persons belonging to Trade Delegation. May 13, German Government expressed regrets for treatment of Russian officials enjoying privileges of extraterritoriality, but refused to recognize privilege as belonging to whole delegation. July 29, Protocol signed in Berlin, by which commercial relations resumed and Trade Delegation re-established and Russian Government gave undertaking that its officials should be forbidden to interfere in German internal politics. Question of extraterritoriality reserved for further negotiations.

May 19. Liquor treaty concluded with United States at Washington. (*A. J. I. L.*, Jan. 1925.) Ratifications exchanged Aug. 11, 1924.

Aug. 29. Arbitration agreement concluded with Sweden at Berlin.

Sept. 12. Agreement concluded with Japan regarding liquidation of German goods confiscated during the war and conditions concerning Part X of Treaty of Versailles.

Sept. 29. German note to Powers represented on Council of League of Nations indicating conditions of entering the League. (*L. N. M. S.*, Dec. 1924.) Oct. 6, French reply despatched stating that France had no objections provided Germany accepted same obligations as other Members of League. Oct. 9, British reply delivered. Dec. 12, Note from German Government to Secretary-General of League, explaining the difficulties in connexion with Germany's admission. (*L. N. M. S.*, Dec. 1924.)

Dec. 2. Treaty of commerce and navigation concluded with Great Britain in London. (*Cmd.* 2345.)

1925. Feb. 10. Commercial treaty of Dec. 8, 1923, with United States ratified by United States Senate with certain reservations.

Greece.

1924. April 19. Republican Government recognized by Belgium.

May 30. Ratifications exchanged of convention with Serb-Croat-Slovene Kingdom of May 10, 1923, regarding free zone at Salonica.

Aug. 18. Agreement concluded with Turkey regarding expropriation of goods and nationals of one country in the other country.

Sept. 10. Greece gave notice of denunciation on Dec. 10, 1924, of all commercial treaties on most-favoured-nation basis.

Sept. 29. Two protocols, one for Bulgaria and one for Greece, regarding protection of minorities, adopted by League of Nations Council and signed by Greek and Bulgarian representatives. 1925, Feb. 1, Protocol rejected by Greek National Assembly. Feb. 11, Greek Government requested that question of minorities should be placed on agenda for next meeting of League Council.

Oct. 22. Greece appealed to League of Nations to intervene in question of expulsion of Greek inhabitants of Constantinople and interpretation of Graeco-Turkish convention of Jan. 30, 1923, providing for exchange of populations. Oct. 24, Provisional agreement between Greece and Turkey reached under auspices of Mixed Commission for Interchange of Populations. Oct. 31, Question considered by League Council; both Governments declared they would make every effort to carry out the Graeco-Turkish convention and agreed to an eventual inquiry by the Council into the situation of the Greek minority at Constantinople and the Turkish minority in Western Thrace. Dec. 13, League Council on request of Mixed Commission decided to ask Permanent Court of International Justice for advisory opinion on interpretation of certain provisions of Art. 2 of Graeco-Turkish convention. 1925, Jan. 28, Mixed Commission, while noting that Oecumenical Patriarch personally fulfilled conditions making him liable to exchange, ruled that it was outside its competence to decide his case, owing to his capacity of Metropolitan. Jan. 30, Oecumenical Patriarch expelled from Constantinople. Feb. 1, Greek note of protest to Turkey suggesting reference of question to Permanent Court of International Justice. Feb. 4, Turkish reply refusing reference to Hague Court. Feb. 10, Greek Government referred dispute to League Council. Feb. 20, Permanent Court gave advisory opinion on interpretation of Art. 2 of convention of Jan. 30, 1923.

Nov. 15. Defensive alliance of May 19, 1913, with Serb-Croat-Slovene Kingdom denounced by latter.

Guatemala.

1924. May 24. Guatemala ratified Treaties of Peace and Amity, Limitation of Armaments, and Establishment of Commissions of Inquiry concluded at Central American Conference at Washington, Feb. 7, 1923.

Hedjaz.

1924. Aug. Agreement signed with Union of Soviet Republics for exchange of diplomatic representatives.

End of August. Wahabis from Nejd attacked Kalikh, but were repulsed.

Sept. 4 or 5. Wahabis attacked Taif. Sept. 10 ? Taif occupied. Oct. 3, King Hussein abdicated in favour of his eldest son Ali. Oct. 15, Wahabis occupied Mecca.

Hungary.

1924. Jan. Agreement concluded with Italy concerning clauses regulating financial questions and questions of communication with Adriatic ports.

March. Agreement with Serb-Croat-Slovene Kingdom regarding restitution of goods abandoned by expelled Hungarian nationals concluded at Budapest.

April 6. Convention concluded with Italy in Rome regarding legal protection of nationals.

April 16. Twelve conventions with Rumania signed at Bukarest providing for settlement of outstanding judicial and financial questions arising from the application of the Treaty of Trianon, and including a commercial agreement on most-favoured-nation basis.

May. Customs agreement concluded with Italy and Serb-Croat-Slovene Kingdom regarding transport of Hungarian goods to Trieste and Fiume.

International Labour Office.

1924. June 16–July 5. Sixth Session of International Labour Conference held at Geneva. Three draft conventions provisionally adopted regarding equality of

treatment in workmen's compensation, weekly suspension of work in glass-manufacturing processes and night work in bakeries; recommendation adopted regarding development of facilities for utilization of workers' leisure.

Iraq.

1924. May 19. Conference between Turkish and British representatives regarding Turkish claim to Mosul Vilayet opened in Constantinople. June 5, Conference broken off. June 9, *Procès verbal* of conference signed by British and Turkish representatives. Aug., British Government referred question of Iraq frontiers to League of Nations. Aug. ? 27, Turkish Government informed Secretary-General of League that Turkish representatives could only take part in the proceedings before the Council after notice of ratification of the Treaty of Lausanne had been received. Sept. 14, Raid by Turkish irregular troops in Mosul Vilayet; raiders repulsed but remained within area of British administration. Sept. 16, Turkish note on frontier question handed to British *chargé d'affaires* in Constantinople. Sept. 17, Turkish memorandum accusing British Government of violating *status quo* delivered to League of Nations; British note of warning regarding frontier raids handed to Turkish Government. Sept. 20, Special session of League Council opened. Sept. 22, Detachments of Turkish regular troops crossed Mosul border; further Turkish note to League regarding British violation of *status quo*. Sept. 25, British delegate agreed in advance to accept Council's decision; Turkish delegate declared his Government recognized the authority of the Council; statement made by British delegate protesting against Turkish raid into Iraq. Sept. 25 and 29, Further British notes handed to Turkish Government. Sept. 30, League Council decided to appoint Commission of three persons to investigate whole frontier question; announced that Turkish Government had agreed unconditionally to accept Council's decision; British and Turkish delegates gave undertakings that pending the final decision no military or other movement should take place which might modify present state of territories. Oct. 2, Further British note of protest handed to Turkish Government. Oct. 5, British memorandum to Turkey claiming that *status quo* which both Governments agreed on Sept. 30 to respect was that existing at time of signature of Lausanne Treaty. Oct. 9, British ultimatum to Turkish Government demanding evacuation of area occupied by Turkish troops in Iraq by midday on Oct. 11. Oct. 10, Turkish reply claiming that agreement of Sept. 30 referred to then existing *status quo* and was being respected. Oct. ? 13, Telegram explaining Turkish position sent by Turkish Government to League. Oct. 14, British Government asked League Council to give decision on exact meaning of its resolution of Sept. 30. Oct. 27, Extraordinary session of League Council opened in Brussels. Oct. 29, Council laid down provisional boundary in Mosul district to be respected by both parties until final frontier fixed; both parties agreed to accept decision. Nov. 13, Commission of Inquiry appointed by League Council met at Geneva and decided to proceed to Iraq to pursue its investigations. Commission arrived at Bagdad Jan. 16, 1925.

Dec. 19. Ratifications exchanged of treaty between Great Britain and Iraq.

Ireland.

1924. June 24. Note from British Government to United States Government regarding appointment of Irish Free State Minister at Washington. June 28, United States Government agreed to proposal. (*T.*, 25.7.24.) Sept. 1, Minister appointed.

July 11. Treaty between Great Britain and Ireland of Dec. 6, 1921, registered with League of Nations Secretariat at request of Irish Free State. Nov. 27, British note to Secretary-General of League stating that British Government does not consider that the Covenant of the League was intended to govern the relations *inter se* of parts of the British Commonwealth and that the terms of Article 18 of the Covenant are therefore not applicable to the Irish Treaty. Dec. 18, Note from Irish Free State Government to Secretary-General of League dissenting from British view. (*L. N. T. S.*, XXVII.)

Italy.

1924. Jan. 31. Italy ratified treaties concerning Greek minorities and Thrace signed at Sèvres, Aug. 10, 1920.

Feb. 21. Italy ratified naturalization conventions signed by Austro-Hungarian Succession States on April 6, 1922.

June 3. Liquor treaty with United States concluded in Washington. Ratifications exchanged Oct. 22, 1924. (*A. J. I. L.*, Jan. 1925.)
June 7. Declarations exchanged with Serb-Croat-Slovene Kingdom concerning non-intervention in Albanian revolt.
June 18. Agreement with Great Britain for rectification of section of Eritrea–Sudan border signed at Kassala, Dec. 26, 1922, approved by exchange of notes of May 19 and June 18. (*Cmd.* 2222.)
July 15. Treaty with Great Britain providing for cession of Jubaland to Italy signed in London.
Sept. 20. General arbitration treaty with Switzerland signed in Rome. Ratified by Switzerland, Dec. 12, 1924. (*F. F.*, 5.11.24.)

Japan.

1924. Jan. 21. Agreement with Great Britain concluded in London for mutual recognition of load-line certificates. (*Cmd.* 2055.)
March 10. Treaty of commerce and navigation with Siam signed at Bangkok.
April 26. Ratifications exchanged at Washington of agreement with United States of August 23, 1923, renewing for five years arbitration treaty of May 5, 1908.

Latvia.

1924. July 16. Extradition treaty concluded with United Kingdom. (*Cmd.* 2238.)

League of Nations.

1924. Sessions of the League of Nations Council held as follows: Twenty-ninth, June 11–17 (German settlers in Poland; Serbo-Albanian frontier; Austrian and Hungarian reconstruction schemes; control of ex-enemy armaments); Thirtieth, Aug. 29–Oct. 3 (Iraq frontier; control of ex-enemy armaments; protection of minorities; Austrian reconstruction; Greek refugees settlement; Protocol for Pacific Settlement of International Disputes); Thirty-first (extraordinary), Oct. 27–31 (Iraq frontier; exchange of Greek and Turkish populations); Thirty-second, Dec. 8–13 (Armaments; minorities).
Sept. 1–Oct. 2. Fifth Session of the Assembly of the League. Sept. 29, Dominican Republic admitted to membership. Oct. 2, Protocol for Pacific Settlement of International Disputes adopted and recommended to acceptance of Governments. (Resolutions and Recommendations: *L. N. O. J.*, *Spec. Supp.* No. 21.)
Nov. 3. First Opium Conference, to consider gradual suppression of use of prepared opium, opened at Geneva. Nov. 17, Second Conference, to consider limitation of production for export opened at Geneva. Dec. 7, First Conference reached agreement on terms of convention and protocol. Dec. 14, First Conference adjourned. Dec. 16, Second Conference adjourned. 1925, Jan. 19, Second Conference resumed. Jan. 25, Joint Committee appointed of members of First and Second Conferences to consider proposals of American delegation to Second Conference. Feb. 6, United States delegation withdrew from Second Conference. Feb. 6 or 7, Chinese delegation withdrew from both Conferences. Feb. 11, Convention and protocol dealing with suppression of use of opium for smoking signed by First Conference. Feb. 19, Convention and protocol regarding suppression of contraband trade in dangerous drugs signed by Second Conference.

Lithuania.

1924. May 7. Memel Convention signed by Allied representatives; May 17, by Lithuanian representatives; July 30, Lithuanian ratification.

Mexico.

1924. Feb. 19. Ratifications exchanged of special claims convention concluded with United States on Sept. 10, 1923. (*P. A. U.*, May 1924.) First meeting of commission held Aug. 18, 1924.
March 1. Ratifications exchanged of general claims convention with United States of Sept. 8, 1923. (*P. A. U.*, May, 1924.) First meeting of Commission held Aug. 30, 1924.
June 15. Mexican Government announced its intention of expelling Mr. Cummins, the British diplomatic agent in Mexico; June 20, Mr. Cummins left Mexico City, having been withdrawn by British Government. (Text of correspondence between British and Mexican Governments, *Cmd.* 2225.) Aug. 2, Mrs. Evans, a British subject, shot dead near her estate in Puebla district.

Muscat.

1924. Feb. 11. Treaty signed with Great Britain prolonging for one year treaty of friendship, commerce and navigation of March 19, 1891. (*L. N. T. S.*, XXV.)

Netherlands.

1924. Feb. 13. Agreement with United States signed at Washington prolonging for five years arbitration agreement of May 2, 1908. Ratifications exchanged, April 5, 1924. (*L. N. T. S.*, XXV.)

Aug. 16. Treaty of friendship concluded with Turkey at Angora.

Aug. 21. Liquor treaty with United States concluded in Washington.

Nicaragua.

1923. Dec. 13. Exchange of notes with United States of Oct. 8 and Dec. 13 regarding withdrawal of American naval forces at Managua and establishment of a police force.

June 21. Nicaragua ratified treaty of peace and amity concluded at Central American Conference at Washington, Feb. 7, 1923.

Norway.

1923. Nov. 26. Agreement concluded with United States renewing for five years from June 24, 1923 the arbitration agreement of April 4, 1908. Ratifications exchanged, March 8, 1924.

1924. Jan. 8. Exchange of notes between France, Germany, and Great Britain declaring that respective Governments would no longer avail themselves of the provisions of the treaty of Nov. 2, 1907 assuring the independence and territorial integrity of Norway. (*L. N. T. S.*, XXIII.)

May 24. Liquor treaty with United States concluded in Washington. Ratifications exchanged, July 2, 1924.

June 27. Convention with Sweden providing for establishment of a conciliation commission signed at Stockholm. (*L. N. T. S.*, XXVIII.) Ratifications exchanged, Aug. 30, 1924.

Panama.

1924. Jan. 15. Agreement concluded with United States concerning construction of roads in Panama and their use by United States troops.

June 6. Liquor treaty with United States concluded in Washington.

Paraguay.

1924. Convention concluded with Uruguay regarding coastwise trade.

Persia.

1924. July 3. Commercial treaty with Union of Soviet Republics concluded at Teheran.

Peru.

1924. Sept. Ratifications exchanged at Lima of arbitration treaty with Venezuela of March 14, 1923.

Poland.

1924. March 17. Ratifications exchanged of treaty of friendship, juridical convention and agreement concerning communications and commercial questions concluded with Turkey on July 23, 1923.

May 10. Note from Union of Soviet Republics to Poland regarding persecution of minorities in Poland. Further exchange of notes during May and June, in which Soviet Government accused Polish Government of violating Art. 7 of the Treaty of Riga and Polish Government asserted that Soviet Government was interfering in Polish internal affairs.

July 18. Consular convention concluded with Union of Soviet Republics.

Aug. 13. Agreement concluded with Great Britain at Warsaw concerning aerial communications.

Aug. 22. Polish ratification of Treaty of St. Germain deposited.

Nov. 14. Debt funding agreement concluded with United States.

1925. Jan. Two agreements regulating payment of Polish debt to Great Britain signed in London.

Feb. 11. Concordat signed with Vatican.

Reparation (*Germany*).

1924, April 9. Reports of Two Expert Committees issued in Paris. (*Cmd.* 2105.) April 16, German Government notified Reparation Commission of its willingness to collaborate in Experts' plans. April 17, Reparation Commission approved within the limits of its powers the conclusions set forth in the reports and agreed to adopt the methods recommended; reports transmitted to Governments concerned. April 24, Replies received from British, Belgian and Italian Governments. (*T.*, 28.4.24.) French reply, April 25. (*Temps*, 27.4.24.) Japanese and Serb-Croat-Slovene Kingdom, April 28. (*Temps*, 1.5.24.)

June 21–22. Conference between M. Herriot and Mr. MacDonald at Chequers, and July 8–9, in Paris. (*Cmd.* 2191.)

July 16. Inter-Allied Conference opened in London attended by representatives of Belgium, British Empire, France, Italy, Japan, United States, Portugal, Greece, Rumania and Serb-Croat-Slovene Kingdom. Three committees appointed (1) to decide what body should adjudicate on question of Germany's default under Dawes Plan; (2) to consider means of restoring Germany's economic and fiscal unity; (3) to deal with methods of transferring German payments from receiving body in Berlin to creditor countries. (*T.*, 17.7.24.) July 28, At third Plenary Session of Conference, decision taken to invite German delegation to Conference; report of Second Committee adopted. Aug. 2, Fourth Plenary Session; Reports of First and Third Committees adopted; invitation sent to German Government. Aug. 5, German delegation arrived. Aug. 9, Agreement reached between German delegation and Reparation Commission regarding transfer of German payments. (*T.*, 12.8.24.) Aug. 16, Agreement reached between Allies and German delegation to accept Dawes Plan at once as a basis for the financial reconstruction of Germany and a means for collection of reparation payments: four agreements initialed; conference terminated. (Proceedings: *Cmd.* 2270.)

Aug. 15. Exchange of notes between French and Belgian Prime Ministers and German Chancellor agreeing that evacuation of Ruhr should take place within a year and that Dortmund-Hörde zone should be evacuated immediately on conclusion of London Agreement. (*E. N.*, 16.8.24.)

Aug. 18. British note to French and Belgian Governments defining position of British Government with regard to occupation of Ruhr.

Aug. 18. Evacuation of Ruhr by French troops began.

Aug. 21. German draft laws for putting Dawes Plan into effect passed Reichsrat. Aug. 28, passed Reichstag. Oct. 12, Announced that laws had come into operation.

Aug. 30. Four agreements concluded at London Conference formally signed. (1) Agreement between Allied Governments and German Government concerning agreement of Aug. 9, 1924 between German Government and Reparation Commission; (2) Agreement between Allied Governments and German Government regarding putting into operation of Dawes Plan; (3) Inter-Allied agreement regarding putting into operation of Dawes Plan. (4) Agreement between Governments represented on Reparation Commission to modify Annex II to Part VIII of Treaty of Versailles. (*Cmd.* 2259.)

Sept. 1. Reparation Commission made first official announcement required under London agreement of promulgation of German laws for putting Dawes Plan into effect. Oct. 13, Second announcement made that necessary conditions had been fulfilled and Dawes Plan had been officially put into execution.

Sept. 9. Levying of duty on customs line between occupied and unoccupied German territory ceased.

Sept. 20. French decree issued establishing import duty of 26% on German goods as from Oct. 1, 1924.

Oct. 10. Agreement between English, French, Belgian and American bankers and German financial delegates for 800,000,000 gold mark loan to German Government signed at Bank of England.

Oct. 25. Agreement reached between M. Clémentel for France and Mr. Logan for United States for recognition under Dawes Plan of United States claims for cost of army of occupation and payment of war damage claims by American citizens against Germany. Nov. 9, British note sent to United States objecting to collection of war damage claims out of proceeds of Dawes Plan. Dec. 12, United States reply claiming same rights as Allied and Associated Powers to collect money from Germany under Dawes Plan.

Oct. 27. Conference of Inter-Allied financial experts opened in Paris to consider problems of dividing German payments among claimants and prepare for meeting

of Allied Finance Ministers. Dec. 23, Conference completed preparatory work.

Oct. 28. Mission Interalliée de Contrôle des Usines et des Mines dissolved.

Oct. 29. Reparation Commission made formal announcement that economic and fiscal unity of the *Reich* had been re-established.

Nov. 12. Reparation Commission issued communiqué regarding reorganization of the Commission as result of Dawes Plan, to be carried out progressively and terminated by Jan. 31, 1925.

Nov. 15. Franco-Belgian railway régime came to an end at midnight Nov. 15–16 ; Railways handed over to German administration.

1925. Jan. 7. Conference of Allied Finance Ministers opened in Paris. Jan. 14, Agreement signed for division of reparation receipts from Germany. (*T.*, 15.1.25.)

Reparation (*Bulgaria*).

1924. March 28. Agreement concluded with Inter-Allied Commission concerning payment of cost of armies of occupation.

Aug. Agreement concluded with Serb-Croat-Slovene Kingdom regarding deliveries to be made by Bulgaria under head of reparation.

Reparation (*Hungary*).

1924. Feb. 3. Convention concluded between Hungary and Serb-Croat-Slovene Kingdom regarding delivery of coal and rolling stock by Hungary under head of reparation.

Rumania.

1924. Jan. 22. Rumania refused credit of 100,000,000 frs. offered by French Government for purchase in France of military and other material.

Feb. 24. Convention concluded with Serb-Croat-Slovene Kingdom at Belgrade regarding property in frontier zones.

March 27. Soviet-Rumanian Conference opened at Vienna. April 2, Negotiations broke down on question of Bessarabia.

April 30. France deposited ratification of treaty of Oct. 28, 1920 by which Powers recognized union of Bessarabia with Rumania.

June 6. Ratifications exchanged of frontier treaty with Serb-Croat-Slovene Kingdom of Nov. 24, 1923.

Siam.

1924. March 24. Ratifications exchanged of extradition treaty with United States of Dec. 20, 1923.

Spain.

1924. Feb. 9. Arbitration agreement with Great Britain of Feb. 27, 1904, renewed by exchange of notes. (*Cmd.* 2077.)

Sept. 29. Treaty of friendship concluded with Turkey.

Sweden.

1924. May 8. Postal agreement concluded with Union of Soviet Republics.

May 22. Liquor treaty concluded with United States. Ratifications exchanged May 31. Treaty of friendship concluded with Turkey Aug. 18, 1924. (*A. J. I. L.*, Jan. 1925.)

June 2. Arbitration treaty concluded with Switzerland. (*F. F.*, 5.11.24.)

June 24. Arbitration treaty concluded with United States.

Tangier.

1924. May 14. Ratifications of convention of Dec. 18, 1923, regarding status of Tangier deposited. (*Cmd.* 2203.)

Turkey.

1924. March 3. Consular convention concluded with Union of Socialist Soviet Republics.

March 24. Straits Convention and Thracian Frontier Convention ratified by Bulgaria.

April 1. Turkish ratification of Treaty of Lausanne deposited ; Aug. 6, British, Italian and Japanese ratifications deposited Aug. 28, ratified by French Senate.

Union of Socialist Soviet Republics.

1924. Feb. 20. Government recognized *de jure* by Austria.

March 13. Government recognized *de jure* by Danzig.

March 14. Provisional agreement for *de jure* recognition of Soviet Government by China signed by representatives of two Governments. March 15, Chinese Government disavowed signature of its representative. March 16 and 26, Soviet notes to China ; April 1, Chinese reply enumerating three points in treaty which must be revised. May 31, Agreement providing for *de jure* recognition and laying down general principles for settlement of outstanding questions, agreement for provisional management of Chinese Eastern Railway, and 7 declarations signed at Pekin ; ratified by Chinese President, June 19. June 17 and July 12, Exchange of notes between Chinese and Soviet Government regarding handing over of Russian legation buildings in Pekin. Sept. 12, Legation handed over to Soviet envoy. Sept. 20, Agreement concluded between Soviet Government and Manchuria regarding execution of Chinese Eastern Railway Agreement of May 31.

March 15. Commercial agreement including provision for *de jure* recognition concluded with Sweden. (*L. N. T. S.*, XXV.) Three declarations also signed relating to mutual claims, Swedish Legation at Leningrad and ships belonging to former Russian Government. Ratifications exchanged of commercial agreement, May 9, 1924.

April 14. Anglo-Soviet Conference opened in London.

May 20. Negotiations opened with Japan for conclusion of a Treaty.

June 18. Soviet Government recognized *de jure* by Denmark.

Aug. 5. Anglo-Soviet Conference in London broke down. Aug. 6, Conference reassembled. Aug. 8, General Treaty and Commercial Treaty signed. (*Cmd.* 2260 and 2261.) Aug. 12, Conference concluded. Nov. 21, British note sent informing Soviet Government that new British Government would not ratify treaties. (*T.*, 22.11.24.) Nov. 28, Russian reply. (*T.*, 29.11.24.)

Aug. 20. Soviet steamer reached Wrangel Island and hoisted Soviet flag.

Aug. 28. Insurrection broke out in Georgia. Sept. 4, Georgian Committee of Independence issued manifesto calling for submission to Soviet Government. (*Temps*, 10.9.24.)

Sept. 18. Treaty for resumption of diplomatic and economic relations concluded with Hungary at Berlin.

Oct. 3. New administration of Chinese Eastern Railway held first session.

Oct. 11. Moldavian Republic formed.

Oct. 24. Note from British Government to Soviet Government protesting against propaganda, particularly letter alleged to have been addressed by Zinovieff to British Communist Party on Sept. 15. (*T.*, 25.10.24.) Oct. 25, Soviet reply. (*T.*, 27.10.24.) Nov. 21, Further British note. (*T.*, 22.11.24.) Nov. 28, Soviet reply. (*T.*, 29.11.24.)

Oct. 28. Telegram despatched by French Government according *de jure* recognition to Soviet Government. Oct. 29, Soviet reply. (*E. N.*, 1.11.24.)

Nov. 6. Soviet Government notified Powers of its claim to islands north of Siberia.

1925. Jan. 20. Treaty containing clauses regulating commercial shipping and consular relations signed with Japan. Feb. 20, Ratified by Soviet Central Executive. Ratified by Japan, Feb. 25.

United States.

1924. April 11. New Immigration Bill adopted by House of Representatives. Japanese note of protest received. April 18, Bill adopted by Senate. May 26, Bill signed by President Coolidge. May 28 and 31, Further Japanese notes of protest. June 16, United States reply (*C. H.*, Aug. 1924). June 30, Quotas according to nationality proclaimed by President Coolidge in pursuance of the Act.

Dec. 3. Agreement concluded with Great Britain regarding British mandate over Palestine.

GENERAL INTERNATIONAL AGREEMENTS[1]

Aerial Navigation : Convention and Protocols ((1), Convention, Paris, Oct. 13, 1919 ; (2) Additional Protocol, Paris, May 1, 1920 ; (3) Protocol regarding modification of Art. 5 of Convention, London, Oct. 27, 1922).

Ratifications : Belgium (3), April 19, 1923 ; Portugal (3), July 30, 1924 ; Rumania (1, 2), May 31, 1924 ; Siam (3), Feb. 20, 1924.

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[1] The place and date of signature are given in brackets. The date given for ratification is that of deposit except when indicated thus : * when the date given, so far as is known, is that of ratification only.

AFRICA : Liquor Traffic—Convention and Protocol (St. Germain-en-Laye, Sept. 10, 1919.)
Accession : Egypt, March 10, 1924.

AGRICULTURE : Creation of an International Institute of, at Rome (Rome, May 28, 1905).
Accessions : Esthonia, April 20, 1924 ; Irish Free State, April 15, 1924 ; Italian Colonies, April 15, 1924 ; Lithuania, April 15, 1924 ; Panama ; Philippines, Hawaii, Porto Rico, and Virgin Islands, May 1, 1924.

ARBITRATION CLAUSES : Recognition of validity in commercial matters—Protocol (Geneva, Sept. 24, 1923).
Signatures : Albania ; Austria, Nov. 24, 1924 ; Chile, Sept. 16, 1924 ; Denmark, May 30, 1924 ; Finland, May 2, 1924 ; Hungary ; Japan, March 15, 1924 ; Latvia, Sept. 12, 1924 ; Monaco, March 29, 1924 ; Netherlands, March 31, 1924 ; Netherlands East Indies, Surinam, and Curaçao, Sept. 20, 1924 ; Norway, Aug. 5, 1924 ; Paraguay, Sept. 29, 1924 ; Rumania, March 6, 1924 ; San Salvador, Sept. 13, 1924 ; Spain, Aug. 30, 1924 ; Switzerland, Sept. 10, 1924.
Ratifications : Albania, Aug. 29, 1924 ; Belgium, Sept. 23, 1924 ; Finland, July 10, 1924 ; Germany, Nov. 5, 1924 ; Great Britain and Northern Ireland, Sept. 27, 1924 ; Italy, July 28, 1924.

ARMS AND MUNITIONS : Traffic—Convention and Protocol (St. Germain-en-Laye, Sept. 10, 1919).
Ratification : Rumania, May 31, 1924.

BIRDS USEFUL TO AGRICULTURE : Protection of—Convention (Paris, March 19, 1902).
Accession : Czechoslovakia, April 3, 1924.

COMMERCIAL STATISTICS : Convention (Dec. 31, 1913).
Accession : Czechoslovakia, Nov. 24, 1924.

COMMUNICATIONS AND TRANSIT : Conventions (Barcelona, April 20, 1921). (1) Freedom of transit (convention and statute) ; (2) Navigable waterways (convention, statute, and additional protocol) ; (3) Right to a flag of states having no sea-coast (declaration).
Ratifications : Austria (3), July 10, 1924 ; Czechoslovakia (2, 3), Sept. 8, 1924 ; France (1), Sept. 19, 1924 ; Netherlands (1), April 17, 1924 ; Poland (1), Oct. 8, 1924 ; Rumania (2), May 9, 1924 ; Switzerland (1), July 14, 1924.
Accessions : Germany (1), April 9, 1923 ; Palestine (1, 2—additional protocol), Jan. 28, 1924 ; Peru (2, 3), Sept. 15, 1924.
— Conventions (Geneva, Dec. 9, 1923). (1) International régime of railways (convention, statute, and protocol of signature) ; (2) International régime of maritime ports (convention, statute, and protocol of signature) ; (3) Transmission in transit of electric power (convention and protocol of signature) ; (4) Development of hydraulic power affecting more than one state (convention and protocol of signature).
Signatures : Bulgaria (1–4), Oct. 31, 1924 ; Czechoslovakia (1–3), June 3, 1924 ; France (1, 3, 4), Oct. 24, 1924 ; Germany (2), Oct. 27, 1924 ; India (1, 2), Sept. 1, 1924 ; Latvia (1), Sept. 13, 1924 ; New Zealand (1–4), Sept. 15, 1924 ; Portugal (1), Oct. 31, 1924 ; Siam (1, 2, 4), Sept. 2, 1924 ; Sweden (1, 2), Oct. 28, 1924 ; Switzerland (1, 2), Oct. 30, 1924.
Ratification : British Empire (1, 2), Aug. 29, 1924.

COPYRIGHT : Revised Convention (Berlin, Nov. 13, 1908 ; Protocol, Berne, March 20, 1914).
Accessions : Greece ; Palestine, March 21, 1924 ; Syria and Lebanon.

CUSTOMS FORMALITIES : Convention (Geneva, Nov. 3, 1923).
Signatures : Bulgaria, Oct. 31, 1924 ; China, Oct. 29, 1924 ; Czechoslovakia, May 8, 1924 ; Denmark, April 23, 1924 ; Hungary, April 29, 1924 ; India, Sept. 1, 1924 ; Netherlands East Indies, Curaçao, Surinam ; New Zealand, May 12, 1924 ; Norway, Oct. 2, 1924 ; Paraguay, Sept. 29, 1924 ; Poland, March 31, 1924 ; Rumania, Oct. 31, 1924 ; Sweden, Sept. 18, 1924.
Ratifications : Austria, Sept. 11, 1924 ; Belgium, Oct. 4, 1924 ; British Empire, Aug. 29, 1924 ; Denmark, May 17, 1924 ; Italy, June 13, 1924 ; New Zealand, Aug. 29, 1924 ; South Africa, Aug. 29, 1924.

CUSTOMS TARIFF : Publication—Convention (Brussels, July 5, 1890).
Accession : Luxemburg, Aug. 18, 1924.

DOCUMENTS : Exchange of—Conventions (Brussels, March 15, 1886). (1) International exchange of official documents and scientific and literary publications ; (2) Exchange of the " Journal Officiel " and of Parliamentary records and documents.
Accession : Danzig, March 15, 1924.

FOOD ANALYSIS : Conventions (Paris, Oct. 16, 1912). (1) Unification and presentation of statistics ; (2) Creation of an international chemistry bureau.
Ratification : Norway (1), Sept. 1, 1924.

INDUSTRIAL PROPERTY : Protection—Convention (Paris, March 20, 1883 ; Revisions : Brussels, Dec. 14, 1900 ; Washington, June 2, 1911).
Ratification : Rumania, Aug. 20, 1924.
Accessions : Esthonia, Dec. 18, 1923 ; Greece, Aug. 18, 1924 ; Syria and Lebanon, June 18, 1924.

— False Indications of Origin of Goods : Convention (Madrid, April 14, 1891 ; Revision, Washington, June 2, 1911).
Accession : Syria and Lebanon, June 18, 1924.

— Rights affected by the World War : Agreement (Berne, June 30, 1920).
Accession : Rumania, June 12, 1924.

— Trade Marks Registration : Convention (Madrid, April 14, 1891 ; Revisions : Brussels, Dec. 14, 1900 ; Washington, June 2, 1911).
Ratification : Rumania, July 30, 1924.
Accession : Luxemburg, July 15, 1924.

LABOUR : Draft Conventions (Washington, Nov. 28, 1919).
(1) Limitation of hours of work ; (2) Unemployment ; (3) Employment of women before and after childbirth ; (4) Night work of young persons employed in industry ; (5) Minimum age for admission of children to industrial employment ; (6) Night work of women.
Ratifications : Austria (1, 2, 4, 6), June 12, 1924 ; Belgium (4, 5, 6), July 12, 1924 ; Netherlands (4), March 17, 1924 ; Poland (2, 4, 5), June 21, 1924.

— Draft Conventions (Genoa, June 15–July 10, 1920).
(1) Minimum age for admission of children to employment at sea ; (2) Unemployment indemnity in case of loss or foundering of the ship ; (3) Facilities for finding employment for seamen.
Ratifications : Denmark (1), May 12, 1924 ; Italy (2, 3), Sept. 8, 1924 ; Japan (1), July 7, 1924 ; Poland * (1–3), June 11, 1924 ; Spain (1, 2), June 20, 1924.

— Draft Conventions (Geneva, Oct. 25–Nov. 19, 1921).
(1) Minimum age for admission of children to employment in agriculture ; (2) Rights of association in agriculture ; (3) Workmen's compensation in agriculture ; (4) Use of white lead in painting ; (5) Application of the weekly rest in industry ; (6) Minimum age for admission of young persons to employment as trimmers and stokers ; (7) Compulsory medical examination of children and young persons employed at sea.
Ratifications : Austria (1, 2, 4), June 12, 1924 ; Bulgaria * (1–7), June 6, 1924 ; Denmark (6), May 12, 1924 ; Esthonia * (4) ; Finland * (1, 2, 5) ; India * (1, 2, 5) ; Irish Free State (2, 3), June 17, 1924 ; Italy (1, 2, 5, 6, 7), Sept. 8, 1924 ; Japan (7), June 7, 1924 ; Latvia (2, 4, 5, 6, 7), Sept. 9, 1924 ; Poland (1–7), June 21, 1924 ; Spain (4, 5, 6, 7), June 20, 1924 ; Sweden * (1–7).

— Amendment to Article 393 of the Treaty of Versailles and to the corresponding Articles of other Treaties of Peace, adopted by the International Labour Conference at its Fourth Session (Geneva, Nov. 2, 1922).
Signatures : China, Jan. 15, 1924 ; Cuba, Sept. 13, 1923 ; France, June 14, 1923 ; Japan, March 15, 1924 ; Norway, Oct. 20, 1923 ; Paraguay, Sept. 29, 1924 ; Poland, Nov. 8, 1923 ; Siam, Oct. 20, 1923.
Ratifications : Albania, Nov. 26, 1924 ; Australia, Oct. 20, 1923 ; Austria, Oct. 9, 1924 ; Belgium, Oct. 29, 1924 ; British Empire, Oct. 20, 1923 ; Canada, Oct. 20, 1923 ; Czechoslovakia, Sept. 30, 1924 ; Denmark, June 20, 1924 ; Finland, March 25, 1924 ; India, Oct. 20, 1923 ; Netherlands, Aug. 14, 1924 ; New Zealand, Oct. 20, 1923 ; Norway, April 8, 1924 ; Poland *, June 12, 1924 ; Rumania, July 19, 1923 ; Siam, March 18, 1924 ; South Africa, Oct. 20, 1923 ; Spain, July 5, 1924 ; Sweden, May 15, 1924 ; Switzerland, Nov. 1, 1924.

LEAGUE OF NATIONS : Amendments to Articles 4, 6, 12, 13, 15, 16, 26, of the Covenant —Protocols (Geneva, Oct. 5, 1921).
Ratifications : Australia (Art. 12), July 5, 1923, (Art. 16), Aug. 12, 1924 ; Brazil (Arts. 6, 16, 26), Aug. 13, 1924 ; British Empire (Art. 16), Aug. 12, 1924 ; Canada (Art. 12), July 5, 1923, (Art. 16), Aug. 12, 1924 ; China (Art. 6), July 4, 1923 ; Finland (Art. 6), June 25, 1923 ; Hungary (Art. 6), June 22, 1923 ; India (Art. 12), July 5, 1923, (Art. 16), Aug. 12, 1924 ; Italy (Art. 6—add. paragraph), June 13, 1924 ; Japan (Art. 6), June 13, 1923 ; Liberia

(Arts. 4 and 6—last paragraph), May 1, 1924 ; New Zealand (Art. 12), July 5, 1923, (Art. 16), Aug. 12, 1924 ; San Salvador (Arts. 4 and 6—last paragraph), Sept. 3, 1924 ; South Africa (Art. 12), July 5, 1923, (Art. 16), Aug. 12, 1924 ; Spain (Arts. 12, 13, 15), Sept. 26, 1924.

— Amendment to Article 16 of the Covenant (Geneva, Sept. 27, 1924).
Signatures : Greece, Oct. 6, 1924 ; Uruguay, Nov. 18, 1924.

Literary and Artistic Works : Protection of—Convention and Protocol ((1) Revised Convention, Berne, Nov. 13, 1908 ; (2) Additional Protocol, March 20, 1914).
Accessions : Palestine (1, 2), March 21, 1924 ; Syria and Lebanon (1), June 18, 1924.

Maritime Conventions (Brussels, Sept. 23, 1910).
(1) Collisions ; (2) Salvage at sea.
Accession : Italian Colonies (2).

Motor Vehicles : International Circulation of—Convention (Paris, Oct. 11, 1909).
Accessions : French East Indies, Oct. 24, 1924 ; Lithuania, Dec. 28, 1924.
Declaration that Convention is binding : Irish Free State ; Saar Territory, July 3, 1924.

Obscene Publications : Repression—Convention (Paris, May 4, 1910).
Ratifications : Brazil, June 3, 1924 ; Bulgaria *, July 6, 1924 ; Esthonia, Feb. 10, 1924 ; Italy *, June 8, 1924.
Accession : Esthonia.

— Convention (Geneva, Sept. 12, 1923).
Signature : Japan, March 31, 1924.
Ratifications : Albania, Oct. 13, 1924 ; Bulgaria, July 1, 1924 ; Italy, July 8, 1924 ; Siam, July 28, 1924.
Accessions : Egypt, Oct. 29, 1924 ; Peru, Sept. 15, 1924.

Opium Convention : Second Protocol (The Hague, Jan. 23, 1912).
Ratifications : Colombia, June 26, 1924 ; Costa Rica, Aug. 1, 1924 ; Latvia *, March 25, 1924 ; Switzerland, Jan. 15, 1925.
Accessions : Palestine, Aug. 21, 1924 : New Hebrides, Aug. 21, 1924.

Pacific Settlement of International Disputes : Protocol (Geneva, Oct. 2, 1924).
Signatures : Albania, Oct. 2, 1924 ; Belgium, Oct. 30, 1924 ; Brazil, Oct. 10, 1924 ; Bulgaria, Oct. 2, 1924 ; Chile, Oct. 16, 1924 ; Czechoslovakia, Oct. 2, 1924 ; Esthonia, Oct. 2, 1924 ; Finland, Dec. 18, 1924 ; France, Oct. 2, 1924 ; Greece, Oct. 2, 1924 ; Latvia, Oct. 2, 1924 ; Paraguay, Nov. 1, 1924 ; Poland, Oct. 2, 1924 ; Portugal, Oct. 2, 1924 ; Serb-Croat-Slovene Kingdom, Oct. 2, 1924.
Ratification : Czechoslovakia *, Oct. 31, 1924.

Pan-American Conventions (Santiago, May 3, 1923).
(1) Arbitration ; (2) Trademarks ; (3) Merchandise classification ; (4) Customs documents.
Ratifications : Brazil (1–4), Oct. 8, 1924 ; Costa Rica * (3, 4), June 25, 1924 ; Cuba * (1–4), Aug. 2, 1924 ; Guatemala * (3, 4), May 15, 1924 ; Paraguay * (3, 4), June 25, 1924 ; United States of America * (1), March 18, 1924.

Permanent Court of International Justice. ((1) Protocol and (2) Optional Clause, Geneva, Dec. 16, 1920.)
Ratifications : Dominican Republic (1, 2), Sept. 30, 1924 ; France (2), Oct. 2, 1924.

Postal : Universal Postal Union (Madrid, Nov. 30, 1920).
(1) Universal postal convention ; (2) Letters, &c., of declared value ; (3) Money orders ; (4) Parcel post ; (5) Payment on delivery ; (6) Postal subscriptions to newspapers ; (7) Postal transfers.
Ratifications : Bolivia (1, 3, 4), June 27, 1923 ; Serb-Croat-Slovene Kingdom, (1–7), June 28, 1924 ; Venezuela (1, 4), Aug. 26, 1924.
Accessions : Iraq (1), July 12, 1924 ; Union of Socialist Soviet Republics (1), June 24, 1924.

— Pan-American Convention (Buenos Ayres, Sept. 15, 1921).
(1) Principal convention ; (2) Parcel post ; (3) Money orders.
Ratification : Bolivia (1), June 27, 1923.
Accession : Spain, June 4, 1924.

— Radio-Telegraph Convention—Revision (London, July 5, 1912).
Accessions : Ecuador ; Irish Free State, April 22, 1924 ; Tanganyika, March 5, 1924.

— Telegraph Convention (St. Petersburg, July 22, 1875 ; Revision, Lisbon, June 11, 1908).
Accession : Palestine.

RED CROSS : Amelioration of the lot of the Wounded and the Sick—Revised Convention (Geneva, July 6, 1906).
Accession : Egypt, Dec. 17, 1924.
REFRIGERATION : International Institute of—Convention (Paris, June 21, 1920).
Accession : Irish Free State.
REFUGEES : Declaration relating to the settlement of Refugees in Greece and the Creation for this Purpose of a Refugee Settlement Commission (Geneva, Sept. 29, 1923).
Signatures : France ; Great Britain ; Italy.
— Arrangement with regard to the Issue of Certificates of Identity to Russian Refugees (Geneva, July 5, 1922).
Adoptions : New Zealand, Oct. 19, 1923 ; Sweden, May 1, 1924 ; Uruguay, Sept. 2, 1924.
SANITARY : Revised Convention. (Paris, Jan. 17, 1912.)
Ratification : Hungary, Aug. 1, 1924.
Accession : New Zealand, May 2, 1924.
SPITSBERGEN : Treaty (Paris, Feb. 9, 1920).
Ratifications : Great Britain, Dec. 29, 1923 ; Italy *, July 19, 1924 ; Norway *, July 21, 1924 ; Sweden, Sept. 15, 1924 ; United States, April 2, 1924.
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INDEX

Aäland Islands question (1920), 114, 123
Adams v. *The People*, case of, 53 fn.
Agrarian legislation in relation to expropriation, 169
Agreements, general international, 264
Air bombardment, 5, 6
Air-force necessity, doctrine of (J. M. Spaight), 1
—— —— ——, limitation of, 6
—— Power and War Rights (J. M. Spaight), review, 229
—— war, special characters of, 4, 5
—— warfare, aim of, 4, 7
Albanian frontier question, Permanent Court and the, 197
Aliens, protection of, writers on international law upon, 160 et seq.
——, punishment of, international law regarding, 45
——, treatment of, within the state, 160
Allegiance, theory of, as source of criminal jurisdiction over aliens, 51, 52, 53
American fear of foreign interference in domestic affairs, 9
Anhalt, case of the (1910), 134
Arbitral tribunals organized under Hague Conventions, 78
"Arbitration," ambiguous meanings of, 71
Arbitration as applied to individual cases of expropriation, 165, 167
—— between Great Britain and Costa Rica, arbitrator's opinions, 199
——, compulsory, compared with obligatory jurisdiction of Permanent Court, 77
——, compulsory, development of, doctrine of, 70 et seq.
——, disputes suitable for, 81 et seq.
——, movement of opinion on, 79
——, reservations as to, 88
—— Treaties, bilateral, since 1899, 85, 87
—— Treaty between Great Britain and the U.S.A. (1897), 80
——, universal compulsory, and the Geneva Protocol, 11, 17
Athanasios, case of the (1915), 129
Attualita, case of the (1916), 130

Baden, case of the, 103
Badere Zaffer, case of the, 107
Baker, Prof. P. J., The obligatory Jurisdiction of the Permanent Court of International Justice, 68
Balfour, Lord, and the obligatory jurisdiction of the Permanent Court of International Justice, 69 et seq.
Bays and straits, territorial jurisdiction in relation to, 156, 157
Beckett, W. E., The exercise of criminal jurisdiction over foreigners, 44
Belgian Courts on immunities of state-owned ships, 138
Belle Poule, case of the, 109
Bibliography, 241
Braeg, Richard (1880), case of, 49 fn.
Brierly, J. L., Matters of domestic jurisdiction, 8
British-American Liquor Convention (1924), 37
British Courts on immunities of state-owned ships, 132 et seq.
—— Empire Delegation to International Conferences, representation of Dominions on, 37, 38
Bulgaria and Greece, dispute between, Permanent Court and the, 195, 197

Cables and the use of the seas, 148, 149
Campos, case of the, 138
Canada and the Lausanne Treaty, 39, 40, 41
Canadian-American Halibut Fisheries Treaty, questions raised by, 33, 34
—— —— Halibut Fisheries Treaty, ratification of, by U. S., 191
—— Belgian commercial treaty, 192
Carlo Poma, case of the (1919), 130
Carnegie Endowment for International Peace and the Hague Academy of International Law, 178, 180
Charkieh, case of the, 141
Cleminson, H. M., Laws of maritime jurisdiction in time of peace with special reference to territorial waters, 144
Comm. v. *Macloon et al.* (1869), case of, 47 fn., 53 fn.
Commerce, Immunities of state-owned ships employed in (J. W. Garner), 128
——, war on, legitimacy of, 4
Compania Mercantile Argentina v. *United States Shipping Board* (1924), 134, 141
"Consent" in relation to formation of rules of international law, 25

Consent of States and the Sources of the Law of Nations (P. E. Corbett), 20
Corbett, P. E., The Consent of States and the Sources of the Law of Nations, 20
Costa Rica and Great Britain, arbitration between, 199
—— —— Packet Arbitration, 59, 60
Council of League of Nations in relation to jurisdiction of Permanent Court of International Justice, 74, 75
Covenant of League of Nations and arbitration of pecuniary claims, 65
Covenant of the League of Nations and obligatory jurisdiction of the P.C.I.J., 72
Criminal jurisdiction, *see* Jurisdiction, criminal
" Custom " in relation to formation of rules of international law, 25
" Custom," meaning of, 26
Cutting Case (Mexico), 44, 46 et seq.

Delagoa Bay Railway arbitration (1900), 165 et seq.
Destruction and devastation, war right of, 2
Devastation, classical instances of, in land warfare, 3
Disputes " likely to lead to a rupture," procedure for, laid down by Article 15 of the Covenant, 8, 9
Domestic jurisdiction, *see* Jurisdiction, domestic
Dominion status, Halibut Fisheries Treaty in relation to, 33, 34
Dominions, international status of, in process of evolution, 42, 43
——, question of international status of, 41
——, status of, dubiety as to, 31
——, Treaty-making power of the (M. M. Lewis), 31
Dominium and *imperium*, difference between, 121
Droit d'aubaine, 169
Dutch Mining Case (1914), 113

Eaglewood, case of the, 138
Egypt : Cairo Court of First Instance on *Finck* v. *Minister of the Interior*, 219
Egyptian Court of Appeal on immunities of state-owned ships, 136
Expropriation and international law (A. P. Fachiri), 159
——, conditions for successful claims, 170, 171
——, rules of international law bearing upon, 160

Fachiri, A. P., Expropriation and international law, 159
Finck v. *Minister of the Interior* (Egypt), case of, 219
Fishing, territorial jurisdiction in relation to, 155
Flag, personal jurisdiction of the, 147 ; and *see under* Allegiance
Florence H., case of the, 135
Foreign Relations, Conduct of, under modern Democratic Conditions (De Witt Poole), review, 237
Foreigners, Exercise of criminal jurisdiction over (W. E. Beckett), 44
Fornage, Raymond (1873), case of, 49 fn.
France and Denmark, Arbitration Treaty between (1911), 87
France, practice of, as to ships of war as prize, 104
Freedom of the Seas, 145, 146 ; and *see under* Seas
French Courts on immunities of state-owned ships, 137

Garner, Prof. J. W., Immunities of state-owned ships employed in commerce, 128
Geneva Protocol, the (Prof. P. J. Noel Baker), review, 232 ; and *see* Protocol
German-American Mixed Claims Commission, decisions of, 204
German Courts on immunities of state-owned ships, 142
Germans domiciled in South-West Africa, naturalization of, 188
Germany, practice of, as to ships of war, as prize, 104
Glenridge, case of the, 138
Great Britain and Costa Rica, arbitration between, 199
Greece and Bulgaria, dispute between, Permanent Court and the, 195, 197
Greek and Turkish populations, exchange of, Permanent Court and the, 198

Hague Academy of International Law (E. N. van Kleffens), 172
—— —— ——, constitution of, 174, 175 et seq.
—— —— ——, finances of, 177, 181
—— —— ——, historical account of its institution, 173 et seq.
—— —— ——, lecturers and subjects, 178, 179
—— —— ——, schedule of lectures for 1925, 184
Hague Convention for the Pacific Settlement of International Disputes (1899), 78
—— —— (1899), Article 16 of, regarding arbitration, 80
Hague Peace Conference (1899), Russian proposals as to pacific settlement of international disputes, 82 et seq., 98
—— —— —— (1907), and arbitration, American position, 78
—— —— —— (1907), and compulsory arbitration, 66, 80, 81
—— —— —— (1907), Portuguese pro-

posals as to compulsory arbitration, 86
Halibut Fisheries Treaty, Canadian-American, 33, 191
Higgins, Prof. A. Pearce, Ships of war as prize, 103
Holstein, case of the, 110
Hurst, Sir Cecil J. B., Wanted ! An International Court of Piepowder, 61

Ice King, case of the (1921), 133, 142
Immunities of state-owned ships employed in commerce (J. W. Garner), 128
Immunity of state ships (Dr. N. Matsunami), review, 239
" Imperfect rights," 95
Imperial Conference of 1923, Resolution of, on treaty-making power of the Dominions, 31, 32, 34, 36, 41
Imperium and *dominium*, difference between, 121
" Independence " in relation to arbitration, 89, 91, 92
International agreements, general, 264
—— claims, delay in settlement of, 62
—— Commission to deal with maritime jurisdiction, proposed, 157, 158
—— Court of Piepowder, Wanted! (Sir Cecil J. B. Hurst), 61
—— disputes, categories of, 82
—— Law (Prof. Charles G. Fenwick), review, 234
—— ——, Hall's, 8th edit. (Prof. A. Pearce Higgins), 227
—— —— Association, rules of, for regulation of air warfare, 5
—— —— Association, Stockholm Conference of, 144
—— ——, decisions of national tribunals involving points of, 211
—— ——, necessity for historical study of, 23
—— ——, particular, a contradiction in terms, 27, 28
—— ——, ultimate sources of, 22, 23
—— litigation, delays in, 61 et seq.
—— servitude, grant of, implications of, 112
—— tribunals, decisions, opinions, and awards of, in 1924–1925, 193
Islands, territorial jurisdiction in relation to, 156
Italian Courts on immunities of state-owned ships, 139
—— Life Insurance Monopoly Expropriation case, 166
Italy, practice of, as to ships of war as prize, 104

Jacobus Christian v. *Rex*, case of, 211 et seq.
Jurisdiction, criminal, over foreigners, basis of, 55, 56
——, ——, ——, exercise of (W. E. Beckett), 44
Jurisdiction, criminal, over foreigners, historical account of, 50, 51, 52
——, ——, ——, practice of different nations regarding, 47–49, 147
——, ——, ——, territorial theory of, 47, 48, 50, 147, 148
——, ——, ——, types of territorial, 54
——, domestic, in Article 15 of Covenant of League, 8
——, ——, interpretation of, 9, 10, 12, 13, 18
——, ——, matters of (J. L. Brierly), 8
——, ——, of a state, definition of matters within the, 9, 10
—— of the flag, personal, 147
—— ——, reconciliation of, with territorial jurisdiction, 150
Jussy, case of the (1906), 129 fn.

Kaiserrie, case of the, 104
Kiel Canal, rights of passage through, 115
King, Rev. Jonas, dispute with Greek Government over expropriation (1853), 164
Kleffens, E. N. van, The Hague Academy of International Law, 172

La Hoche, case of the, 109
Lake Monroe, case of the, 135
Land, redistribution of, after the war, 159
Lausanne Conference, absence of Canadian representation at, 39
League of Nations, Council of, and Aäland Islands question, 114
—— —— Conventions on Maritime ports and railways, 152
—— ——, Council of, and Jurists as to obligatory jurisdiction of P.C.I.J., 73, 74
—— ——, Covenant of, and disputes likely to lead to a rupture, 8, 9 ; and *see under* Covenant
Lewis, Malcolm M., The Treaty-making power of the Dominions, 31
Lusitania compensation awards, 204 et seq.

McNair, A. D., So-called State servitudes, 111
Maipo, case of the (1918), 131, 132, 133, 140 fn.
Majestas, possession of, by Mandatory, 214 et seq.
Mandatory in relation to crime of high treason, 214
Mandats Internationaux, La Théorie Générale des (J. Stoyanovsky), review, 238
Maritime jurisdiction in time of peace, laws of, with special reference to territorial waters (H. M. Cleminson), 144
—— ——, Laws of, draft Convention on, 144, 145
Mavrommatis Palestine Concessions, Permanent Court and the, 193, 196

Methods of Covenant and Protocol in regard to problem of domestic jurisdiction, 15
Mexico and the Cutting case, 46
Mighell v. *Sultan of Johore*, 134
Military necessity, 1, 2
Minorities, protection of, as qualifying independence of States, 92
Monastery of Saint-Naoum dispute, Permanent Court and the, 197

National Tribunals, decisions of, involving points of international law, 211
Naturalization of Germans domiciled in South-West Africa, 188
Naval defence, territorial jurisdiction in relation to, 156
—— Prize Act of 1864 as basis of modern law of prize, 107
—— —— —— 1918, 107, 108
—— —— Fund, 107, 108
Nelson on Prize money in case of destruction of captured ships, 110
Newfoundland dispute with France over fishery rights, 99
—— fishery claims, delay in decisions of, 64
North Atlantic Coast Fisheries Arbitration (1910), 111 et seq.
Notes, 188

Obituary Notice :—
Salmond, Sir John, 187
Obligatory jurisdiction of Permanent Court of International Justice (P. J. Baker), 68
Official publications, 248
" Origin " of a rule, 24
Owners of S.S. Victoria v. *Owners of the Quillwark* (1921), 134
Oyster fisheries, territorial jurisdiction in relation to, 154

Palestine Concessions, Mavrommatis, Permanent Court and the, 193, 196
Pampa, case of the (1917), 129, 130
Pan-American Congress (1890), its " Plan of Arbitration," 80, 88
Paquete Habana and the *Lola* (1899), case of, 24.
Parlement Belge, case of the (1880), 128, 132, 141, 142
Pearl fisheries, territorial jurisdiction in relation to, 154
Periodical publications, 247
Permanent Court of International Justice, advisory opinions of, 75, 76
—— —— —— and " domestic jurisdiction," 11 et seq.
—— —— ——, Committee of Jurists and the Statute regarding jurisdiction, 69, 70
—— —— ——, judgments and advisory opinions of, in 1924–1925, 193
Permanent Court of International Justice, Obligatory Jurisdiction of (P. J. Baker), 68
—— —— ——, optional declaration accepting obligatory jurisdiction, 68
—— —— ——, publications of, 248
Pesaro, case of the (1921), 131, 140, 143
Piepowder, Courts of, 61
——, definition of, 61
——, International Court of, Wanted! (Sir Cecil J. B. Hurst), 61
Piracy, concurrent jurisdiction in, 148
——, international law as to, 45
Porto Alexandre, case of the (1919), 132, 140 fn., 142
Portuguese Religious Properties expropriation case (1910), 167
Private property, destruction of, right of, 2, 3
—— ——, " sacredness " of, a myth in war, 4, 7
Prize Acts of 1708 and later, 106, 107
—— bounty, 106
—— Cases, reports of, in relation to ships of war, 109
—— Court, condemnation in, not necessary in case of enemy warships, 103
—— —— Rules of 1914, 108
—— money in case of destruction of prizes, 110
Property, war on, likely to replace war on life, 7
Protection of aliens, 160 et seq.
Protocol, Geneva, for the Pacific Settlement of International Disputes, in relation to " domestic jurisdiction," 11 et seq.
——, ——, in relation to obligatory jurisdiction of Permanent Court, 68
——, ——, —— pacific settlement of disputes, 16
Pursuit, right of, from territorial waters, 151

R. v. *Combs*, case of, 53 fn.
R. v. *Holmes*, case of, 54 fn.
R. v. *Lewis*, case of, 53 fn.
R. v. *Nillins*, case of, 53 fn.
R. v. *Oliphant*, case of, 53 fn.
R. v. *Veltheim*, case of, 53 fn.
Rebus sic stantibus, doctrine of, 99, 100, 122
Reg. v. *Keyn*, case of, 29
Reviews of Books :—
Air Power and War Rights (J. M. Spaight), 229
Foreign Relations, The Conduct of, under Modern Democratic Conditions (De Witt Poole), 237
Geneva Protocol, the (Prof. P. J. Noel Baker), 232
Immunity of State Ships (Dr. N. Matsunami), 239
International Law (Prof. Charles G. Fenwick), 234
International Law, Hall's, 8th edit. (Prof. A. Pearce Higgins), 227

Reviews of Books (*cont.*):—
Mandats Internationaux, La Théorie Générale des (J. Stoyanovsky), 238
Völkerrechts und der Diplomatie, Wörterbuch des (Prof. Dr. Julius Hatschek and Dr. Karl Strupp), 236
Roseric, case of the (1918), 130, 140
Russia, practice of, as to ships of war as prize, 105

Saar Basin and rights of passage, 116, 117
Salmond, Sir John, obituary notice of, 187
Santa Isabella, case of the, 103
Seas, the free use of the, 145, 146
——, free use of the, plan adopted for securing, 150
——, use and abuse of, in time of war, 149
Servitudes, international, 120
——, state, definitions of, 119
——, State, opinions of text-writers as to, 118 et seq.
——, ——, so-called (A. D. McNair), 111
——, ——, —— permanence of, 123, 124, 125
Seven Bishops' Case, 53 fn.
Ships of war as prize (A. P. Higgins), 103
—— —— ——, customs of various powers in regard to, 104, 105
—— —— ——, historical account of British practice, 105
——, state-owned, employed in commerce, immunities of (J. W. Garner), 128
Sicilian Government and Great Britain, dispute over sulphur monopoly (1836), 163
"Source," ambiguities involved in the term, 20 et seq.
—— and "basis" of International Law confused, 23
—— and "evidence" distinction between, 24
Sources of the Law of Nations, Consent of States and the (P. E. Corbett), 20
South Africa, Supreme Court of, on *Jacobus Christian* v. *Rex*, 211
South-West Africa, legal position of, under Treaty of Versailles, 213
—— —— Naturalization of Aliens Act (1924), 188
Sovereignty of a Mandatory, question of, 214, 216
Spaight, J. M., The doctrine of air-force necessity, 1
"Statute of limitations" between states, need of, 64
Submarine mines, tunnels, and cables, territorial jurisdiction in relation to, 154
Sumatra, case of the (1920), 136, 137
Summary of Events, 251
Switzerland, Inter-cantonal servitudes in, 118

Territorial jurisdiction, conditions of immunity from, 151
Territorial jurisdiction, reconciliation of jurisdiction of flag with, 150
—— limit of maritime jurisdiction, 152 et seq.
—— theory of criminal jurisdiction over aliens, 47, 48, 50
—— waters, three-mile limit of, objections to extension of, 153
The State v. *Carter*, case of, 53 fn.
Three-mile limit of territorial waters, 152, 153
Transit Conference of Barcelona, 96
Travers' classification of criminal jurisdiction over aliens, 55–58
Treason, high, in a mandatory state, 214
"Treaties" and "agreements between governments" distinguished, 32
Treaties as origin of rules of international law, 27
——, Bryan (1913–1914), and arbitration, 87
——, Canadian, two recent, 191
——, obsolescence of, disputes arising from, 97
——, part of, in science of international law, 28, 29
——, submission of, to Parliament before ratification, 188
Treaty, commercial, between Canada and Belgium, 192
Treaty of Neuilly, Article 179, Permanent Court and the interpretation of, 195, 197
Treaty of Versailles and questions of servitudes, 115 et seq.
—— ——, legal position of South-West Africa under, 213
Treaty-making power of the Dominions (M. M. Lewis), 31
Tunis and Morocco Nationality Decrees, in relation to "domestic jurisdiction," 11
Turkish and Greek populations, exchange of, Permanent Court and the, 198
Tyler v. *The People*, case of, 47 fn., 53 fn.

U.S. v. *Davis*, case of, 53 fn., 54 fn.
U.S. Federal Courts on immunities of state-owned ships, 129 et seq.
U.S. practice as to ships of war as prize, 104
U.S. principles of protection of their citizens abroad, 162
Universal Postal Union (1874) in relation to compulsory arbitration, 79, 81

Venezuelan Arbitrations of 1903, delays in decisions of claims, 63, 64

Westlake on the limits of international arbitration, 88 et seq.
Wimbledon, case of the, 115, 116
Wörterbuch des Völkerrechts und der Diplomatie (Prof. Dr. Julius Hatschek and Dr. Karl Strupp), review, 236

1956 1

1957 1

1958

1977 - 1

1979 - 1

86 - 1

88 - 1

91 - 1